No. 97-1008-CFX Title: Carolyn C. Cleveland, Petitioner
v.
Policy Management Systems Corporation, et al.

Docketed: December 18, 1997 Court: United States Court of Appeals for the Fifth Circuit

See also:
97-1991
98-5286

Entry	Date	Proceedings and Orders
	Dec 15 1997	Petition for writ of certiorari filed. (Response due January 17, 1998)
	Jan 20 1998	Waiver of right of respondents Policy Management Systems, et al. to respond filed.
	Jan 28 1998	DISTRIBUTED. February 20, 1998
	Feb 6 1998	Response requested.
	Mar 9 1998	Brief of respondents Policy Management Systems, et al. in opposition filed.
	Mar 25 1998	REDISTRIBUTED. April 17, 1998
	Apr 20 1998	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
	Jul 30 1998	Brief amicus curiae of United States filed.
	Aug 12 1998	REDISTRIBUTED. September 28, 1998
	Oct 5 1998	Petition GRANTED. limited to the following questions:1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C 12101 et seq. 2.If it does not create such a presumption, wha weight, if any, should be given to the application for,or receipt of, disability insurance benefits when a person asserts she is a "qualified individual with a disability" under ADA? SET FOR ARGUMENT February 24, 1999.
		**********
	Oct 20 1998	Record filed.
	Oct 26 1998	Record filed.
	Nov 13 1998	Order extending time to file brief of petitioner on the merits until December 3, 1998.
	Nov 13 1998	Order extending time to file brief of respondent on the merits until January 19, 1999.
	Dec 3 1998	Brief of petitioner Carolyn Cleveland filed.
	Dec 3 1998	Joint appendix filed.
	Dec 3 1998	Brief amici curiae of Aids Policy Center for Children, et al. filed.
	Dec 3 1998	Brief amici curiae of National Employment Lawyers Association, et al filed.
	Dec 3 1998	Brief amicus curiae of Equal Employment Opportunity Commission filed.
	Jan 13 1999	Motion of Solicitor General for leave to participate in

No. 97-1008-CFX

Entry	Date	Proceedings and Orders
		oral argument as amicus curiae and for divided argument filed.
	Jan 14 1999	CIRCULATED.
	Jan 19 1999	Brief of respondents Policy Management Systems Corporation, et al. filed.
	Jan 19 1999	Brief amicus curiae of Association of American Railroads filed.
	Jan 19 1999	Brief amicus curiae of Equal Employment Advisory Council filed.
	Jan 25 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Feb 24 1999	ARGUED.

Supreme Court, U.S.
FILED

97 1008 DEC 15 1997

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

CAROLYN C. CLEVELAND,

Petitioner,

vs.

POLICY MANAGEMENT SYSTEMS CORP; GENERAL INFORMATION SERVICES, a Division of Policy Management Systems Corporation; and CYBERTEK CORP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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80 pp

QUESTIONS PRESENTED FOR REVIEW

Carolyn Cleveland sued her former employers for violating the Americans with Disabilities Act ("ADA") when they terminated her for alleged poor performance after suffering a stroke and returning to work, despite her employers' admitted refusal to reasonably accommodate her resultant disability. Post-discharge of her employment, Cleveland was granted social security disability benefits retroactive to the date of her stroke which preceded her return to work without requested accommodation. The termination and the employer's tortious conduct directly worsened Cleveland's disability.

Nevertheless, and contrary to the decisions of most other Circuit Courts, the Fifth Circuit affirmed summary judgment, reasoning that Cleveland's social security disability application presumptively judicially estopped her from asserting she was a "qualified individual with a disability". The Fifth Circuit concluded its reasoning with the proposition that only under limited and highly unusual circumstances could a social security disability applicant/recipient rebut the presumption that such application and/or receipt would judicially estop such a person from maintaining that they were a "qualified individual with a disability." The questions presented for review are:

1. Doesn't the victim of an ADA violation have a right of action under the ADA for disability/wage loss damages caused by inability to work resulting from a tortious violation of the ADA?

2. Couldn't a covered employer, when equipped with the Fifth Circuit's opinion, patently and with impunity refuse to hire or fire a social security applicant/recipient solely because he/she is disabled, ignoring even the simplest of work place accommodations and without ever having to even articulate a

legitimate non-discriminatory business reason for the adverse employment action?

3. Realizing that Congress recognizes that Americans with disabilities continually encounter various forms of discrimination, doesn't the Fifth Circuit's reasoning that a social security claimant or recipient is presumptively estopped from asserting that he/she is a "qualified individual with a disability" pose yet another form of discrimination against those individuals who are disabled in the eyes of the law?

4. Doesn't the Fifth Circuit's opinion exhibit a judicially crafted means of excluding social security recipients from the protection of the ADA?

5. Doesn't the Fifth Circuit's opinion presumptively exclude a protected class (those regarded as being disabled) from protection of the ADA?

6. Doesn't the Fifth Circuit's opinion relegate social security recipients to perpetual ward status?

7. Did the United States Court of Appeals for the Fifth Circuit Court err in holding that: (1) "the application for or receipt of social security disability benefits creates a *rebuttable* presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability' " for purposes of pursuing a claim under the Americans With Disabilities Act ("ADA"); and that (2) this presumption can only be overcome in "limited and highly unusual circumstances", a holding which is clearly contrary to decisions of the United States Courts of Appeals for the Sixth, Seventh, Eleventh and D.C. Circuits, as well as the Social Security Administration and the Equal Employment Opportunity Commission, each of which has determined that judicial estoppel

would rarely apply to such a case because a finding of "disability" by the Social Security Administration ("SSA") is *not* inconsistent with a finding that the same individual is a "qualified individual with a disability" because the ADA considers the issue of reasonable accommodation when determining "disability" and the SSA does not.

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Petitioner respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 120 F.3d 513 (5th Cir. 1997), affirmed the decision of the United States District Court for the Northern District of Texas, which granted summary judgment in favor of the Respondents. The Fifth Circuit's August 14, 1997 opinion is printed here as Appendix A. The district court's September 6, 1996 opinion is printed here as Appendix B. The Fifth Circuit's September 15, 1997 Order denying Petitioner's Petition for Rehearing is printed here as Appendix C.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit entered on August 14, 1997. Petitioner's timely filed petition for rehearing was denied by the Fifth Circuit Court of Appeals on September 15, 1997.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

STATUTES INVOLVED

The statues applicable to this case are as follows:

Americans With Disabilities Act of 1990:

General Rule

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and or other terms conditions, and privileges of employment. 42 U.S.C. § 12112(a)

Disability

The term "disability" means, with respect to an individual —

> **(A)** a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> **(B)** a record of such an impairment; or
>
> **(C)** being regarded as having an impairment. 42 U.S.C. § 12102(2)

Qualified individual with a disability

> The term "qualified persons with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8)

Social Security Act:

Disability

> The term "disability" means — inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d)(1)(A); 42 U.S.C. § 1382c(a)(3)(A).
>
> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. 42 U.S.C. § 423(d)(2)(A); 42 U.S.C. § 1382c(a)(3)(B).

STATEMENT OF THE CASE

A. Basis for Federal District Court Jurisdiction

Petitioner, Carolyn C. Cleveland ("Cleveland") brought suit against her former employers, Respondents, Policy Management Systems Corp., General Information Services and Cybertek Corp., pursuant to the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* and Tex. Lab. Code Ann. § 451.001 (Vernon 1996)[1].

1. Cleveland's Tex. Lab. Code Ann. § 451.001 claim was dismissed without prejudice by the district court on the September 6, 1996 and is not at issue here.

Jurisdiction was proper in the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 1331.

B. Facts Material to Consideration of the Questions Presented

On January 7, 1994, during the course and scope of her employment with the Respondents, Carolyn Cleveland suffered a stroke.

Steven Herzog, M.D. provided medical treatment to Cleveland in connection with her stroke. As a result of the stroke, Cleveland suffered a condition known as aphasia. Aphasia is a disorder involving input and output of language, which affects reading ability, calculation ability, and the understanding and processing of all language functions. Aphasia also causes problems with memory.

After the stroke, Cleveland's ability to speak and to concentrate were impaired, and for a period of time, she could not speak at all. Cleveland was unable to read or dial a phone, and had trouble understanding most of what was said to her. Additionally, Cleveland's memory was impaired as a result of the stroke-induced aphasia.

After observing Cleveland's difficulty with communication, comprehension and memory, Cleveland's daughter, Sheri Short, became concerned about her mother. As a result, in January 1994, Short obtained an application for social security disability benefits.[2] Short filled in the application and had her mother sign it. Short then submitted the application to the Social Security Administration

2. Short had previously worked for the Tarrant County Adult Probation Department for approximately 14 years, and had observed that it often took a long time for government paperwork to be processed. Therefore, Short requested the social security application quickly in the event her mother would need benefits.

for her mother. Due to Cleveland's debilitated condition in January 1994, she does not recall her daughter filing this application, and although Cleveland signed the application form, she does not recall doing so.

After suffering the stroke, Cleveland worked hard to recover, and according to Dr. Herzog, she had made significant progress between January and April 1994. In fact, after undergoing speech rehabilitation, Cleveland was able to speak fairly well by April 1994.

In light of Cleveland's progress, Dr. Herzog released Cleveland to return to work in April 1994. At the time Cleveland was released to return to work, Dr. Herzog felt Cleveland's prognosis was positive for continued improvement and that she would eventually reach a near 100% recovery.

Cleveland returned to work for the Respondents in April 1994 on a part-time basis. Shortly after returning to work, Cleveland received some paperwork from the Social Security Administration. Upon receiving this paperwork, Cleveland contacted the Social Security Administration and informed them that she had returned to work and that she did not need social security disability benefits.

Cleveland worked part-time for about two weeks and then started working full time. Cleveland was fearful about returning to work, but her supervisors, Anthony Clark and Debra Levine, claimed they would assist Cleveland, or, if necessary, would provide her another job. This did not occur.

When Cleveland returned to work, she was not fully recovered from the stroke[3], and she experienced some difficulty with the increased workload she was assigned. As the Fifth Circuit noted in

3. Dr. Herzog noted that it sometimes takes 6-12 months to fully recover from a stroke.

their August 14, 1997 opinion, Cleveland requested several accommodations, including computer training, permission to take work home in the evenings, a transfer of position, and permission for the Texas Rehabilitation Commission to provide a counselor — free of charge — to assist Cleveland; however, the Respondents refused each of these requests.

In addition to the refusal to make reasonable accommodations for Cleveland, Cleveland's supervisor and her co-workers made cruel mocking remarks in reference to Cleveland's disabled condition. In Cleveland's presence, they laughed at her and belittled her by mimicking her stroke-induced speech impediment.

Less than two months after returning to work from her stroke, Cleveland received her first written warning. After this written warning, Cleveland doubled her efforts to produce quality work. In fact, a day or two before Cleveland's termination, Cleveland felt encouraged because she was finally getting some training from some of her co-workers, training which her supervisor repeatedly withheld.

In addition to finally receiving some training, Cleveland was experiencing fewer problems related to her stroke during the time prior to the termination. Cleveland could communicate more easily, her spelling had improved and the need to repeatedly recheck her work was decreasing.[4] Cleveland felt positive about her job performance. Indeed, prior to her termination, Dr. Herzog had anticipated that Cleveland would experience a near 100% recovery.

Regardless, on or about July 14, 1994, Peter Moore, Regional Vice President, and supervisor Debra Levine informed Cleveland

4. Dr. Herzog observed that Cleveland was experiencing few problems with aphasia, but still needed some additional time to recover fully.

that she was terminated because of poor job performance. Cleveland begged Moore to let her keep her job or move to another job. At this, Moore told Cleveland that his father had previously suffered a stroke and has not been able to do anything since. Moore declared that Cleveland would not be able to do anything either. During the initial termination meeting, Moore did agree to review Cleveland's work; however, the next day, Moore confirmed the termination.

As a result of Cleveland's termination in July 1994, she was devastated emotionally. Cleveland became depressed and her aphasia worsened as a result of the humiliating way she was treated and terminated by the Respondents. Cleveland deteriorated physically and began to feel worthless. Cleveland was fatigued, stressed and depressed after her termination.

For this reason, in September 1994, Cleveland renewed her prior application for social security disability benefits by filing a "Request for Reconsideration". In this request, Cleveland confirmed that: "I continue to be disabled". In connection with this request, Cleveland also filed a "Work Activity Report" wherein she explained that she had been terminated from her job with the Respondents because she could no longer do the job because of her condition — indeed, this was the Respondents' stated reason for termination.

In approximately December 1994, Cleveland began seeing a psychologist, Dr. Gant, for her depression and worsening condition. Dr. Gant determined that the loss of Cleveland's job and income were "emotionally devastating and have compounded her injury by affecting her self-confidence and self-esteem." Dr. Herzog noted in December 1994 that "[s]tress and anxiety have also exacerbated all of her [Cleveland's] symptoms."

In January 1995, Cleveland filed another "Request for Reconsideration" with the SSA and again confirmed that she was

unable to work due to her disability. In September 1995, Cleveland was granted social security disability benefits effective retroactively to January 7, 1994, the date of her stroke.

Approximately one week before receiving notice of the decision from the SSA, Cleveland filed suit against the Respondents for discriminating against her, failing to accommodate her disability and terminating her in violation of the Americans With Disabilities Act. The Respondents moved for summary judgment on the ADA claim for the sole reason that Cleveland was judicially estopped from claiming to be a "qualified individual with a disability" under the ADA by reason of her application for and receipt of social security disability benefits.

Included in the evidence presented in opposition to the summary judgment motion was an affidavit from Dr. Herzog, wherein he opined that Cleveland's depression resulted from her termination and that her depression over the termination caused her aphasia to worsen. Dr. Herzog further stated that, in his opinion, had Cleveland "been given training time and assistance on the job, instead of being terminated, she would have continued to recover from the stroke." Dr. Herzog also noted that "[w]ith time, understanding and therapy, Cleveland has slowly begun to recover from the post-termination relapse of her aphasia and depression."

Nevertheless, finding that Cleveland was judicially estopped from claiming to be a "qualified individual with a disability" because she previously declared herself "disabled" to the SSA, the district court granted summary judgment on Cleveland's ADA claim. In an opinion filed August 14, 1997, the Fifth Circuit Court of Appeals affirmed the summary judgment and held that Cleveland, "failed to raise a genuine issue of material fact which, if proved, would rebut the presumption that her sworn declarations of disability to the Social Security Administration (SSA) judicially estop her from asserting that under the ADA she is a 'qualified individual with a disability.' "

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT HAS ISSUED AN OPINION ON AN IMPORTANT FEDERAL ISSUE WHICH HAS YET TO BE ADDRESSED BY THE SUPREME COURT, AND IN SO DOING HAS CRAFTED A MEANS OF EXCLUDING THE DISABLED FROM THE PROTECTION OF THE AMERICANS WITH DISABILITIES ACT.

Enacting the Americans with Disabilities Act of 1990, Congress specifically found that:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in and contribute to society.

42 U.S.C. § 12101(a).

Congress stated that:

> [H]istorically, society has tended to isolate and segregate individuals with disabilities and that despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.

Id.

Congress further found that discrimination based on disability persists in critical areas such as employment, and recognized that unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion or age, disabled individuals have often had no legal recourse to redress such discrimination. *Id.* According to Congress:

> [T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.

Id.

Congress concluded that:

> [T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and cost the United States billions of dollars in unnecessary expenses resulting from *dependency* and nonproductivity.

(Emphasis added). *Id.*

After making such findings, Congress set forth the purpose of the ADA; to wit: (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf

of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities. 42 U.S.C. § 12101(b).

Absent review by The Court of the effect of a declaration of disability to the SSA on an ADA claim, disabled individuals will be relegated to their pre-1990 status of being members of a society that may freely, without fear of legal recourse, discriminate against the disabled. The well-founded purpose for enacting the ADA is entirely usurped by the Fifth Circuit's holding that the application for or receipt of social security disability benefits creates a rebuttable presumption that the disabled individual is judicially estopped from asserting that he is a "qualified individual with a disability" for purposes of pursuing a discrimination in employment claim under the ADA. The ADA's goal to eliminate discrimination against disabled individuals is further defeated by the Fifth Circuit's determination that an individual such as Cleveland was judicially estopped from pursuing an ADA claim and that judicial estoppel would only be inapplicable in "limited and highly unusual circumstances".

The evidence in the present case established that had the Respondents not discriminated against Cleveland during her attempt to return to work, her condition would have continued to improve rather than deteriorate as it did after the termination. In other words, but for the Respondent's discriminatory conduct, Cleveland would not have been forced to renew her application for social security disability benefits. It was only after, and as a result of, the termination (which caused the worsening of her condition) that Cleveland actively pursued and received social security disability benefits.

Honoring the purpose and foundation of the ADA, employers such as the Respondents should not be absolved from violating the

ADA simply by reason of the fact that the employee at some point in time applied for or received social security disability benefits. Indeed, to allow the Fifth Circuit's ruling on this issue to stand, an employer would be able to hire an individual who is receiving social security disability benefits, and later freely discriminate against that individual. In other words, if the employer decided it no longer wished to comply with the law, the employer could blatantly discriminate against such an individual and that individual would have no legal recourse simply because she was receiving social security disability benefits. Additionally, an employer reluctant to hire the disabled could openly weed out disabled applicants by simply refusing to hire any individual who has applied for or receives social security disability benefits. Such an employer could, without fear of prosecution, place a sign in the window which read: "Social Security Disability Recipients Need Not Apply". On its face, such conduct would plainly violate the ADA; however, in light of rulings such as the Fifth Circuit ruling in the present case[5], a disabled individual subjected to such discrimination would have no recourse if they had previously applied for or received social security disability benefits. In light of the multitude of Americans receiving social security disability benefits today, the Fifth Circuit's determination that social security disability applicants are presumptively judicially estopped from asserting an ADA claim will allow the history of discrimination based on disability to persist

5. The United States District Courts of Appeals for the Third, Eighth and Ninth Circuits have also found that the doctrine of judicial estoppel bars an ADA claim when the employee has applied for or received social security disability benefits. *See McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 617-18 (3rd Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997); *Dush v. Appleton Elec. Co.*, 124 F.3d 957 (8th Cir. 1997) and *Risetto v. Plumber and Steamfitters Local 343*, 94 F.3d 597, 606 (9th Cir. 1996). Notably, in a recent opinion, the Third Circuit acknowledged that *McNemar* had come under considerable criticism, some of which might be well-founded, and indicated that upon presentation of an applicable case, the issue may be revisited en banc. *Krouse v. American Sterilizer Company*, 126 F.3d 494, 502-03 (3rd Cir. 1997).

and permeate into the present and the future despite the enactment of the ADA — a statute specifically enacted to protect the disabled.

II.

THE FIFTH CIRCUIT'S HOLDING THAT: (1) "THE APPLICATION FOR OR RECEIPT OF SOCIAL SECURITY DISABILITY BENEFITS CREATES A *REBUTTABLE* PRESUMPTION THAT THE CLAIMANT OR RECIPIENT OF SUCH BENEFITS IS JUDICIALLY ESTOPPED FROM ASSERTING THAT HE IS A 'QUALIFIED INDIVIDUAL WITH A DISABILITY' " FOR PURPOSES OF PURSUING A CLAIM UNDER THE AMERICANS WITH DISABILITIES ACT ("ADA"); AND THAT (2) THIS PRESUMPTION CAN ONLY BE OVERCOME IN "LIMITED AND HIGHLY UNUSUAL CIRCUMSTANCES" IS CLEARLY CONTRARY TO DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH, SEVENTH, ELEVENTH AND D.C. CIRCUITS, AS WELL AS THE POSITIONS OF THE SOCIAL SECURITY ADMINISTRATION AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EACH OF WHICH HAS DETERMINED THAT JUDICIAL ESTOPPEL WOULD RARELY APPLY TO SUCH A CASE BECAUSE A FINDING OF "DISABILITY" BY THE SOCIAL SECURITY ADMINISTRATION ("SSA") IS *NOT* INCONSISTENT WITH A FINDING THAT THE SAME INDIVIDUAL IS A "QUALIFIED INDIVIDUAL WITH A DISABILITY" BECAUSE THE ADA CONSIDERS THE ISSUE OF REASONABLE ACCOMMODATION WHEN DETERMINING "DISABILITY" AND THE SSA DOES NOT.

In addition to deviating from the purpose of the ADA, the Fifth Circuit's holding is in direct contrast to decisions from the Sixth,

Seventh, Eleventh and D.C. Circuit Courts of Appeals, as well as the positions of the Social Security Administration and the Equal Employment Opportunity Commission.

Specifically, the United States Court of Appeals for the District of Columbia Circuit has issued two opinions wherein it held that receipt of social security disability benefits is *not* a bar to a disability discrimination claim. *See Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582 (D.C. Cir. 1997); *Whitbeck v. Vital Signs, Inc.*, 116 F.3d 588 (D.C. Cir. 1997). The court in *Swanks* and *Whitbeck* rejected the argument that a social security disability claim precludes a disability discrimination claim because the two schemes employ "quite different standards and objectives". *Swanks*, 116 F.3d at 583-4; *Whitbeck*, 116 F.3d at 591. Rejecting a judicial estoppel theory, the D.C. Circuit in *Swanks* and *Whitbeck* recognized that in determining eligibility for social security disability benefits, the critical issue in an ADA case — *reasonable accommodation* — is *not* considered. *Swanks*, 116 F.3d at 583-87; *Whitbeck*, 116 F.3d at 591. The D.C. court noted that no where in the SSA's five step evaluation process for determination of eligibility for disability benefits is the issue of reasonable accommodation considered. *See Swanks*, 116 F.3d at 584-85. Moreover, in an Information Memorandum, the SSA states that "[t]he fact an individual may be able to return to a past relevant job, provided that the employer makes accommodations, is not relevant. . . ." *See Swanks* at 585, *citing*, Daniel L. Skoler, ASSOC. COMM'R SOC. SEC. ADMIN., DISABILITIES ACT INFO. MEM. at 2, June 2, 1993 (No. SG3P2).

The *Swanks* and *Whitbeck* holdings are significant because they are based on guidance from the SSA and the Equal Employment Opportunity Commission. Specifically, prior to rendering the *Swanks* and *Whitbeck* opinions, the court sought and considered amici curiae briefs from the SSA and the EEOC. *Swanks* at 584; *Whitbeck* at 590. Considering the standards and procedures

of the SSA and the EEOC, the D.C. Circuit determined that a social security disability claim does not bar a disability discrimination claim.[6] *Swanks* at 583-87; *Whitbeck* at 591.

As in *Swanks*, the Equal Employment Opportunity Commission filed an amicus curie brief in support of Clevelands' petition for rehearing in this case. *See* Appendix D. In addition to pointing out the conflict of the decision with recent circuit case law, in the amicus curie brief, the EEOC pointed out that the Fifth Circuit's decision in *Cleveland* was "flatly inconsistent with the position of the Social Security Administration." (Appendix D, p. 19a). The EEOC quoted the position of the SSA, as was set forth in the amicus curiae brief by the SSA in *Swanks*, as follows: "[a]n application for, and award of, social security disability benefits does not constitute an admission as a matter of law that the individual is physically unable to work", and thus, does not, under any circumstance, "bar as a matter of law his claim under the ADA." *(See* Appendix D, p. 19a). As noted by the EEOC, applying the SSA's legal standards for determining eligibility for disability benefits, it is clear that judicial estoppel has no place in the context of an ADA claim because in the SSA context, there is no specific inquiry into "the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." (Appendix D, p. 24a). Confirming this point, the SSA specifically stated in a June 2, 1993 memorandum, which specifically addressed the ADA's "potential effect on the evaluation

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6. In *Swanks*, the court also stated that in reaching this conclusion, it did not mean that statements in support of a social security disability claim were never relevant in an ADA case. *Swanks*, at 587. As example, keeping with the position that SSA determinations do not consider whether a claimant could work with reasonable accommodations, the *Swanks* court noted that statements to the SSA that a claimant could not perform the essential functions of their job even with accommodation could bar that claimant from asserting in an ADA claim that an accommodation would have allowed them to perform that same job. *Swanks*, at 587.

of disability under the [SSA]", that "[t]he fact that an individual may be able to return to a past relevant job, provided that the employer makes accommodations, is not relevant to the [eligibility determination]." (Appendix D, p. 24a). As noted by the EEOC, in this memorandum, the SSA concluded that eligibility standards under the ADA and SSA have "no direct application to one another"; therefore, a finding of "total disability" under the SSA is not "synonymous" with a finding of an inability to work either with or without reasonable accommodations for purposes of the ADA. (Appendix D, p. 24a). As was reaffirmed by the SSA in its amicus curiae brief in *Swanks*, there is nothing "inherently inconsistent" between a claim for social security disability benefits and a claim of being an otherwise qualified individual with a disability under the ADA. (Appendix D, p. 25a). Also, as acknowledged by the EEOC and SSA, there are many individuals who would qualify as disabled because of having one of the SSA's listed impairments and that:

> [M]any persons with listed impairments, for example, amputations, in fact are able to work quite successfully, even though SSA would find them "disabled" if they decided not to work and instead sought benefits.

(Appendix D, p. 26a).

The EEOC also opined in its amicus curiae brief that although properly rejecting any absolute rule that a claim for social security disability benefits bars suit under the ADA, the Fifth Circuit had:

> [E]mbraced a standard that would leave aggrieved individuals without recourse under the ADA in most cases in which an individual has applied for or received social security disability benefits.

(Appendix D, p. 23a).

Indeed, the Fifth Circuit's claim that it would be the "highly unusual" case wherein a social security disability recipient would not be barred from an ADA claim is directly contrary to the EEOC's and the SSA's position that an ADA claim which is properly barred by some inconsistent statement in the SSA application would be the rarity.

In conformity with the position of the EEOC and the SSA, and in the wake of *Swanks*, the Sixth Circuit Court of Appeals, on rehearing, issued a Supplemental Opinion on August 22, 1997 wherein it stated that it agreed with the holding in *Swanks* that receipt of social security disability benefits does not preclude an ADA claim, that judicial estoppel is rejected and that prior sworn statements are only considered as a material factor in analyzing the case. *Blanton v. Inco Alloys International, Inc.*, 123 F.3d 916, 917 (6th Cir. 1997).

In addition to *Swanks*, *Whitbeck* and *Blanton*, the Seventh Circuit recently confirmed its position that an individual's claim for social security disability benefits does not bar a claim under the ADA. *See Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997).[7] The *Weigel* court held that the granting of social security disability benefits "is not determinative as to whether or not she [the employee] may be considered a 'qualified individual' under the ADA." *Weigel*, 122 F.3d at 466. The Seventh Circuit held that statements of "disability" to the SSA are "not irrelevant to the question of whether an ADA plaintiff is a 'qualified individual with a disability' " and that, in the absence of evidence that the individual could have performed her prior job with reasonable accommodation,

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7. *See also Overton v. Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992) wherein the Seventh Circuit held that the issue of whether the plaintiff was entitled to social security disability benefits might be relevant to the severity of the handicap, but that such a determination could not be construed as a judgment that such a plaintiff was not qualified to do his job under the Rehabilitation Act.

such statements along with other evidence could support summary judgment. *Id.* at 466-68. The *Weigel* court, however, also held that declarations of being " 'wholly unable to work,' or some other variant to the same effect" is not conclusive on the issue of whether that same individual is a "qualified individual with a disability" under the ADA. *Id.* At 466-67. As such, the court found that the apparent incongruity between an ADA claim and an SSA claim is "entirely illusory because the terms, 'totally disabled' and 'qualified individual with a disability' are terms of art that must be understood within their respective statutory contexts." *Id.* at 466.

In *Talavera v. School Board of Palm Beach County*, __ F.3d __ (11th Cir. 1997) (1997 WL 728368 (11th Cir. Nov. 24, 1997)), the Eleventh Circuit Court of Appeals joined the ranks of the majority of circuit courts and held that "a certification of total disability on an SSD [social security disability] application is not inherently inconsistent with being a 'qualified individual with a disability' under the ADA." *Talavera* at *7. The *Talavera* opinion is significant because it illustrates the fact that the Fifth Circuit's "rebuttable presumption" position in *Cleveland* is a deviation from the opinions of the majority of circuit courts on this issue. Specifically, when analyzing the case law on the interplay between a claim for social security disability benefits and a claim of being a "qualified individual with a disability", the Eleventh Circuit noted that the Fifth Circuit's opinion in *Cleveland* exuded an "obvious skepticism" and displayed a reluctance to find that individuals who are "totally disabled" for social security disability purposes are covered by the ADA. *Talavera* at *7. Rejecting the "skeptical" position of the Fifth Circuit, the Eleventh Circuit followed the reasoning behind *Swanks, Blanton,* and *Weigel* and held that:

> A certification of total disability on a SSD application does mean that the applicant cannot perform the essential functions her job without reasonable accommodation. It does not necessarily

> mean that the applicant cannot perform the essential functions of her job with reasonable accommodation.

Talavera at *7.

In contrast to the position of the EEOC, the SSA, and the Sixth, Seventh, Eleventh and D.C. Circuit Courts of Appeals, when analyzing the facts in *Cleveland* and determining that her statements were "entirely inconsistent", the Fifth Circuit failed to consider the fact that inquiries in a social security disability claim do not encompass the accommodation issue. (Appendix A, pp. 12a-13a). Specifically, as noted by the Fifth Circuit in *Cleveland,* the statements in question were as follows: (1) in an initial application filed with the assistance of her daughter, Cleveland stated that she was "unable to work because of her disabling condition on January 7, 1994" and was "still disabled"; (2) a September 1994 (post termination) "Request for Reconsideration" which stated "I continue to be disabled"; (3) a "Work Activity Report" which stated she was terminated "because I could no longer do the job because of my condition"; (4) a January 1995 second "Request for Reconsideration" and May 1995 request for hearing wherein she stated she was "unable to work due to my disability". (Appendix A, p. 3a). Contrary to the Fifth Circuit's finding that these statements were inconsistent with her claim she was a "qualified individual with a disability", such statements do not bar Cleveland's ADA claim as a matter of law because they do not speak to the issue of reasonable accommodation. *See Swanks* at 583-87.

In light of the SSA's complete lack of consideration of reasonable accommodations in an SSA determination of "disability", there is nothing inconsistent about Cleveland's statements to the SSA. Because the question of reasonable accommodation was not raised in the SSA proceeding, Cleveland's statements in her SSA claim that she was "disabled" or "unable to work" or "unable to do [her] job" were not inconsistent with her

claim in her ADA case that she would have been able to do her job had she been provided reasonable accommodation. Based on facts similar to the present case wherein the employee had no accommodation in his or her past work, the *Swanks* court held that an SSA "determination that the claimant cannot do past work says *nothing* about the claimant's ability to perform his or her former job." (emphasis added) *Swanks* at 585. As in *Swanks*, *Whitbeck*, *Weigel* and *Blanton*, Cleveland's statements regarding her disability are not inconsistent and do not bar her ADA claim.

Nevertheless, the Fifth Circuit ignored the absence of the consideration of reasonable accommodations by the SSA and ruled that Cleveland's ADA claim was barred by judicial estoppel. Far from being a fact specific ruling, under the Fifth Circuit's opinion in *Cleveland*, similar statements of an inability to work, which are no doubt made by most all other social security disability applicants, would act to bar most every ADA claim brought by social security disability applicants or recipients.

CONCLUSION

The Fifth Circuit's presumption of judicial estoppel cannot be reconciled with the holding of the majority of the circuit courts that the application for or receipt of social security disability benefits is *not inconsistent* with being a "qualified individual with a disability"; therefore, absent review by The Court an inherent inconsistency will inequitably fester in the application of a federal law designed to in part to provide "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." *See* 42 U.S.C. § 12101(b)(3).

Absent review by the Court, of the Fifth Circuit's decision on this sharply conflicting legal issue, disabled individuals will be left to suffer the indignities of discrimination without recourse and without the protection of the law specifically designed to protect the disabled.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 14, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-11247

CAROLYN C. CLEVELAND,

Plaintiff-Appellant,

versus

POLICY MANAGEMENT SYSTEMS CORPORATION; GENERAL INFORMATION SERVICES, a Division of Policy Management Systems Corporation; CYBERTEK CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

Before WIENER and PARKER, Circuit Judges, and LITTLE,* District Judge.

WIENER, Circuit Judge:

Plaintiff-Appellant Carolyn C. Cleveland appeals the district court's grant of summary judgment for her former employer, Defendant-Appellee Policy Management Systems Corporation

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* Chief District Judge of the Western District of Louisiana, sitting by designation.

(PMSC), on her claim of wrongful termination under the Americans with Disabilities Act (ADA).[1] We affirm, concluding that Cleveland has failed to raise a genuine issue of material fact which, if proved, would rebut the presumption that her sworn declarations of disability submitted to the Social Security Administration (SSA) judicially estop her from asserting that under the ADA she is a "qualified individual with a disability."

I.

FACTS AND PROCEEDINGS

PMSC hired Cleveland in August 1993. The following January, Cleveland suffered a stroke while on the job and took a leave of absence. She was unable to return to work immediately, however, as the stroke caused aphasia, a condition that affects concentration, memory, and language functions such as speaking, reading, and spelling.

With her daughter's assistance, Cleveland filed an application for social security disability benefits. In support of her sworn application, Cleveland certified that she had become "unable to work because of [her] disabling condition on January 7, 1994" and that she was "still disabled." She acknowledged also that it is a crime to make a false statement in an application for social security disability benefits.

In April 1994, Cleveland's doctor released her to return to work and anticipated an eventual recovery for her of nearly 100%. Cleveland alleges that when she returned to work at PMSC she contacted the SSA and informed them that she had

1. 42 U.S.C. §12101 *et seq.* (1994).

returned and that she no longer needed disability benefits. PMSC concedes that she informed the SSA of her return but denies that she ever withdrew her application for disability benefits or otherwise indicated that she was anything other than totally disabled.

Following her return, Cleveland did not perform well at PMSC. She requested several accommodations, including computer training, permission to take work home in the evenings, a transfer of position, and permission for the Texas Rehabilitation Commission to provide a counselor — free of charge — to assist her. PMSC denied each of her requests. In July 1994, PMSC terminated Cleveland for poor job performance.

Cleveland claims that as a consequence of her firing she became depressed and that her aphasia worsened. In September 1994, she renewed her application for social security disability benefits by filing a "Request for Reconsideration" in which she stated, "I continue to be disabled," and a "Work Activity Report" in which she stated that she was terminated "because I could no longer do the job because of my condition." In January 1995, Cleveland filed another "Request for Reconsideration" and that May requested a hearing before an Administrative Law Judge (ALJ), in both instances representing that she was "unable to work due to my disability."

In September 1995, the ALJ concluded that Cleveland had become disabled on January 7, 1994 and was disabled continuously through the date of the ALJ's decision. Consequently, the ALJ granted her social security disability benefits, effective retroactively to January 7, 1994.

One week before the ALJ's decision, Cleveland had filed

suit against PMSC for wrongful termination in violation of the ADA and the Texas Labor Code. PMSC moved for partial summary judgment, asserting that Cleveland could not establish a prima facie case under the ADA, as her representations in her application for, and her receipt of, social security disability benefits estopped her from claiming that she is a "qualified individual with a disability." The district court granted PMSC's motion on the ADA claim and dismissed the state law claim without prejudice.

Cleveland timely appealed, insisting that she is not estopped from establishing as a matter of law that she is a "qualified individual with a disability." Specifically, she maintains that her position in pursuit of social security disability benefits and her instant position under the ADA are not inconsistent, as (1) she was disabled for purposes of social security disability benefits when she filed the initial application; (2) when she returned to work, she notified the SSA and withdrew her claim for benefits; and (3) she became disabled *again* for purposes of social security disability benefits only after and as a result of her termination. Cleveland contends that, from the time she returned to work until she was terminated, she could have performed the essential functions of her job with a reasonable accommodation, i.e., during that period she was a "qualified individual with a disability."

II.

ANALYSIS

A. Standard of Review

We review the district court's grant of summary judgment

de novo, applying the same standards as the district court.[2] Summary judgment is proper when the evidence, viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.[3]

B. Applicable Law

The ADA prohibits an employer from discriminating against "a qualified individual with a disability because of the disability."[4] To assert an ADA violation successfully, in the absence of direct evidence of discrimination, a plaintiff must first make a prima facie showing that, inter alia, he is a "qualified individual with a disability."[5] A "disability" is "a physical or mental impairment that substantially limits one or more of the major life activities" of the individual.[6] A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions" of his job.[7]

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2. *Melton v. Teachers Ins. & Annuity Assn. of America*, 1997 WL 285720, at *1 (5th Cir. June 16, 1997).

3. *River Production Co., Inc. v. Baker Hughes Production Tools, Inc.*, 98 F.3d 857, 859 (5th Cir. 1996) (citing Fed. R. Civ. P. 56(c)).

4. 42 U.S.C. §12112(a) (1994).

5. *See Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995).

6. 42 U.S.C. §12102(2)(A) (1994).

7. 42 U.S.C. §12111(8) (1994).

Appendix A

The Social Security Act prescribes an individual's eligibility for social security disability benefits. An individual is entitled to receive such benefits if he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment"[8] and only if that impairment is of such severity that he is unable to do his previous work and cannot engage in any other kind of substantial gainful work which exists in the national economy.[9]

When the two statutes are read in pari materia, it seems logically inconsistent, at first blush, for an individual to claim that he qualifies for social security disability benefits while simultaneously maintaining that he can perform the essential functions of his position for purposes of asserting an ADA claim. Herein lies the dilemma.

Several of our fellow circuits have held that a plaintiff who represents that he is totally disabled for purposes of recovering social security disability benefits cannot then assert that he is a "qualified individual with a disability" for purposes of bringing an ADA claim. Those circuits have barred the subsequent ADA claim under various theories of preclusion, including the equitable doctrine of judicial estoppel.[10]

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8. 42 U.S.C. §423(d)(1)(A) (Supp. 1997). The impairment must be expected to result in death or to last for a continuous period of not less than twelve months.

9. 42 U.S.C. §423(d)(2)(A) (Supp. 1997).

10. The Third, Sixth, Seventh, and Ninth Circuits have invoked the doctrine of judicial estoppel. *See McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 617-18 (3d Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 958 (1997) (plaintiff estopped from arguing that he is qualified under the

(Cont'd)

Appendix A

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ADA); *Blanton v. Inco Alloys Int'l, Inc.*, 108 F.3d 104, 108-09 (6th Cir. 1997) (plaintiff's previous representations to the SSA estop him from claiming that he can perform the essential functions of his position, *but* error for the district court to apply judicial estoppel to plaintiff's claim that he could have performed other jobs); *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995) (plaintiff estopped from arguing that he was anything other than actually disabled); and *Risetto v. Plumber and Steamfitters Local 343*, 94 F.3d 597, 606 (9th Cir. 1996) (plaintiff estopped from claiming that she was performing her job adequately when she had previously obtained a favorable settlement based on her assertion that she could not work). The First and Eighth Circuits have treated a plaintiff's prior representations to the SSA as binding admissions. *See August v. Offices Unlimited, Inc.*, 981 F.2d 576, 584 (1st Cir. 1992) (plaintiff conceded that he was totally disabled at all relevant times and cannot now establish that he was a "qualified handicapped person" and thus cannot make the prima facie case required to prevail under the Massachusetts discrimination statute) and *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768, 771 (8th Cir. 1987), *cert. denied*, 485 U.S. 938, 108 S. Ct. 1116 (1988) (plaintiff admitted that she cannot perform the essential functions of the job in question and that she will be unable to do so in the near future; therefore, she does not qualify for protection under the federal Rehabilitation Act). The Ninth Circuit has precluded a plaintiff's subsequent ADA claim based on an insufficiency of evidence to overcome plaintiff's prior sworn statements to the SSA. *See Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481-82 & n.3 (9th Cir. 1996) (unnecessary to apply judicial estoppel when there was no genuine issue of material fact that plaintiff was totally disabled; only evidence to the contrary was plaintiff's self-serving and uncorroborated affidavit in support of her ADA claim). In addition, a number of district courts have disallowed the subsequent ADA claim. *See e.g. Hatfield v. Quantum Chemical Corp.*, 920 F. Supp. 108, 110 (S.D. Tex. 1996) (logically inconsistent for plaintiff to say that he is so impaired that he cannot care for himself while simultaneously arguing that he can go to work and perform his job); *Harris v. Marathon Oil Co.*, 948 F. Supp. 27, 29 (W.D. Tex. 1996), *aff'd*, 108 F.3d 332 (5th Cir. 1997) (impossible for plaintiff to have been totally disabled under social security law and able to perform

(Cont'd)

Appendix A

Judicial estopped prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding.[11] The doctrine serves a clear purpose: to protect the integrity of the judicial process.[12]

We decline, however, to adopt a per se rule that automatically estops an applicant for or recipient of social security disability benefits from asserting a claim of discrimination under the ADA.[13] It is at least theoretically

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the essential functions of his position under the ADA); *Johnson v. Hines Nurseries, Inc.*, 950 F. Supp. 175, 178 (N.D. Tex. 1996) (plaintiff should be judicially estopped from claiming that he is a qualified individual with a disability after representing himself as totally disabled to the SSA, *but* noting that plaintiff's representations of total disability are at a minimum factors to consider in determining if a fact question exists as to whether plaintiff could have performed his job); *Johnson v. City of Port Arthur*, 892 F. Supp. 835, 842 n.1 (E.D. Tex. 1995) (plaintiff's pursuit of social security disability benefits is a position at odds with his ADA claim); and *Reigel v. Kaiser Foundation Health Plan of North Carolina*, 859 F. Supp. 963, 970 (E.D.N.C. 1994) (plaintiff "cannot speak out of both sides of her mouth with equal vigor and credibility").

11. *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996).

12. *United States v. C.I.T. Constr. Inc. of Texas*, 944 F.2d 253, 258 (5th Cir. 1991).

13. *See D'Aprile v. Fleet Services Corp.*, 92 F.3d 1, 4-5 (1st Cir. 1996) (plaintiff's application for disability benefits may not have constituted a broad admission of incapacity; genuine issue of material fact existed as to whether plaintiff could have continued to work with a reasonable accommodation); *Blanton*, 108 F.3d at 109-10 (plaintiff's previous representations to the SSA did not estop him from claiming that

(Cont'd)

Appendix A

conceivable that under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive, as the SSA's determination of an applicant's entitlement to social security disability benefits would not be synonymous with a determination that a plaintiff is or is not a "qualified individual with a disability" under the ADA.[14]

(Cont'd)
he could have performed other jobs); *Shirley v. Westgate Fabrics, Inc.*, 1997 WL 135605, at *3 (N.D. Tex. Mar. 17, 1997) ("There is no rigid rule that receipt of disability benefits precludes recovery on an ADA claim. Courts that have considered the issue have concluded that the receipt of disability benefits is a factor to be considered by the court."); *Morton v. GTE North Inc.*, 922 F. Supp. 1169, 1182 (N.D. Tex. 1996), *aff'd*, 114 F.3d 1182 (5th Cir. 1997) (strict estoppel approach has no support in the case law); *Hughes v. Reinsurance Group of America*, 957 F. Supp. 1097, 1100 (E.D. Mo. 1996) (evidence demonstrates that plaintiff was representing that she could not perform her particular job, not that she was totally disabled); and *Smith v. Dovenmuehle Mortgage, Inc.*, 859 F. Supp. 1138, 1142 (N.D. Ill. 1994) ("Defendant's position would place plaintiff in the untenable position of choosing between his right to seek disability benefits and his right to seek redress for an alleged violation of the ADA.").

14. *Robinson v. Neodata Services, Inc.*, 94 F.3d 499, 502 n.2 (8th Cir. 1996) (SSA determination of eligibility for benefits is not synonymous with determination whether plaintiff is a qualified individual for purposes of the ADA; at best, social security determination is evidence for trial court to consider in making its own independent determination); *Weiler v. Household Finance Corp.*, 101 F.3d 519, 523-24 (7th Cir. 1996) ("Because the ADA's determination of disability and a determination under the Social Security disability system diverge significantly in their respective legal standards and statutory intent, determinations made by the Social Security Administration concerning disability are not dispositive findings for claims arising under the ADA."); and *Pegues v. Emerson Electric Co.*, 913 F. Supp. 976, 980 (N.D. Miss. 1996) (a finding of disability by the SSA does not necessarily foreclose an ADA claim).

First, while the ADA requires an individualized inquiry into the ability of a particular person to meet the requirements of a particular position, the SSA permits general presumptions about an individual's ability to work. The SSA considers some conditions to be presumptively disabling. If a claimant has an impairment that is medically equivalent to a listed impairment, the SSA presumes that the disorder is so severe as to prevent the claimant from doing any substantial gainful activity, without considering his age, education or past work experience.[15] Thus, an individual can have a "disability" under the SSA definition and still be able to work.

Second, the SSA does not consider whether the individual can work with reasonable accommodation. An SSA interpretative guidance addressing the SSA's disability determination process states,

> The fact that an individual may be able to return to a past relevant job, provided that the employer makes accommodations, is not relevant to the issues to be resolved. . . . [H]ypothetical inquiries about whether an employer would or could make accommodations that would allow return to a prior job would not be appropriate.[16]

Thus, a person may be unable to do any work which exists in the national economy even though he can work with a reasonable accommodation. In those instances, the person is both a person

15. 20 C.F.R. §404.1520(d) (1997).

16. *See* "Americans with Disabilities Act of 1990 — INFORMATION," Memorandum from the Associate Commissioner, Social Security Administration 1 (June 2, 1993).

with a "disability" under the SSA and a "qualified individual with a disability" under the ADA. Accordingly, a person claiming to be disabled under the SSA may still be entitled to protection under the ADA.

Third, even the SSA recognizes that an individual may be able to qualify as SSA "disabled" and still be able to work in a particular position. For example, the SSA has a trial work period that allows beneficiaries to work for nine months while their benefit entitlement and payment levels remain unchanged.[17] Similarly, the SSA provides individuals who return to work with benefits in any month in which earnings fall below a statutory level.[18]

We hold therefore that the application for or the receipt of social security disability benefits creates a *rebuttable* presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a "qualified individual with a disability." We thus leave open the possibility that there might be instances in which the nature and content of the disability statement submitted to the SSA, in the context of the particular facts of the case, would not absolutely bar a plaintiff from attempting to demonstrate that despite his total disability for Social Security purposes he is a "qualified individual with a disability." Conceivably, such a plaintiff might be able to rebut this presumption if he were able to present credible, admissible evidence — such as his social security disability benefits application, other sworn documentation, and his allegations relevant to his ADA claim — sufficient to show that, even though he may be disabled for purposes of social

17. 20 C.F.R. §404.1592(a) (1997).

18. *Id.*

security, he is otherwise qualified to perform the essential functions of his job with a reasonable accommodation and thus not estopped from asserting an ADA claim.

C. Is Cleveland Estopped From Asserting Her ADA Claim?

We conclude that, on the facts before us — particularly her sworn statements to the SSA that she was disabled — Cleveland has not raised a genuine issue of material fact to rebut the presumption that, while she remains disabled for purposes of Social Security, she is estopped from asserting that she is a "qualified individual with a disability." Cleveland continuously and unequivocally represented to the SSA that she is totally disabled and completely unable to work. As her statements are unambiguous and previously uncontroverted, she cannot now be heard to complain that she could perform the essential functions of her job during the time between her return to work and her termination. To permit Cleveland to make such an argument in the face of her prior, consistent, and — until now — uncontested sworn representations to the SSA would be tantamount to condoning her advancement of entirely inconsistent positions, a factual impossibility and a legal contradiction.[19]

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19. *Pegues*, 913 F. Supp. at 980-81 (ADA claim not necessarily foreclosed, but when plaintiff previously represented in administrative proceedings that she was unable to work, she cannot now argue that she could have performed the essential functions of her job with a reasonable accommodation); *Morton*, 922 F. Supp. at 1182-83 (under these facts, plaintiff has no standing to assert ADA claim, as she has continuously represented that her disability prevented her from performing her job); and *Garcia-Paz v. Swift Textiles, Inc.*, 873 F. Supp. 547, 555 (D. Kan. 1995) (on this record, plaintiff is estopped from asserting ADA claim; having collected substantial benefits and based on these unambiguous and seemingly informed representations, plaintiff cannot now claim that she could perform the essential functions of her job).

III.

CONCLUSION

As Cleveland consistently represented to the SSA that she was totally disabled, she has failed to raise a genuine issue of material fact rebutting the presumption that she is judicially estopped from now asserting that for the time in question she was nevertheless a "qualified individual with a disability" for purposes of her ADA claim. For the foregoing reasons, the district court's grant of summary judgment for PMSC is AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION FILED SEPTEMBER 6, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. 3-95-CV-2140-AJ

CAROLYN C. CLEVELAND

VS.

POLICY MANAGEMENT SYSTEMS CORP., GENERAL INFORMATION SERVICES, a division of POLICY MANAGEMENT SYSTEMS CORP., and CYBERTEK CORPORATION

JUDGMENT

This action came on for consideration of defendants' motion for partial summary judgment, the undersigned Magistrate Judge presiding by the express consent of all parties, and the Court having determined that plaintiff is estopped as a matter of law from claiming to be a qualified individual under the Americans with Disabilities Act.

It is ORDERED and ADJUDGED that the motion for partial summary judgment on plaintiff's claim under the Americans with Disabilities Act be, and it is, hereby granted, that this action be, and it is, dismissed on the merits, and that defendants have and recover of plaintiff their costs of action.

Appendix B

It is further ORDERED and ADJUDGED that plaintiff's claim for relief for alleged violations of Tex.Lab.Code Ann. §451.001 be, and it is, hereby dismissed without prejudice.

Signed this 6*TH* day of September, 1996.

s/ illegible
UNITED STATES MAGISTRATE
JUDGE

APPENDIX C — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 15, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-11247

CAROLYN C CLEVELAND

Plaintiff - Appellant

v.

POLICY MANAGEMENT SYSTEMS CORP; GENERAL INFORMATION SERVICES, a Division of Policy Management Systems Corporation; CYBERTEK CORP

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING

Before WIENER and PARKER, Circuit Judges, and LITTLE,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is *denied.*

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* Chief District Judge of the Western District of Louisiana, sitting by designation.

Appendix C

ENTERED FOR THE COURT:

s/ Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX D — BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT'S PETITION FOR REHEARING FILED SEPTEMBER 5, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-11247

CAROLYN C. CLEVELAND,

Plaintiff-Appellant,

v.

POLICY MANAGEMENT SYSTEMS CORPORATION and GENERAL INFORMATION SERVICES,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT'S PETITION FOR REHEARING

STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("Commission") is the agency charged with the enforcement of Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ("ADA"). In an opinion dated August 14, 1997, a panel of this Court affirmed a grant of summary judgment in favor of the defendants, relying heavily on the fact that the

plaintiff had certified that she was totally disabled in support of her claim for disability benefits under the Social Security Act. In dismissing the plaintiff's claim, the panel declined to adopt "a per se rule that automatically estops an applicant for or recipient of social security disability benefits from asserting a claim of discrimination under the ADA." *Cleveland v. Policy Management Systems Corp.*, No. 96-11247, 1997 WL 464657, *3 (5th Cir. Aug. 14, 1997). The panel ruled, however, "that the application for or the receipt of social security disability benefits creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.' " *Id.* at *4. The panel implied that an individual would be able to overcome this presumption only "under some limited and highly unusual set of circumstances." *Id.* at *3.

The panel's decision should be revised or withdrawn for at least three reasons. First, the panel's ruling that an individual is presumptively estopped from asserting an ADA claim, when the individual has applied for or received social security disability benefits, is flatly inconsistent with the position of the Social Security Administration ("SSA"), as recently articulated in a brief filed in the D.C. Circuit Court of Appeals. In that brief (included as an addendum to this brief), the SSA stated that "[a]n application for, and award of, social security disability benefits does not constitute an admission as a matter of law that the individual is physically unable to work" and, thus, does not, under any circumstance, "bar as a matter of law his claim under the ADA." Brief of the SSA at 8, *Swanks v. WMATA*, 116 F.3d 582 (D.C. Cir. 1997) ("*Swanks* Brief"). The panel's ruling is also inconsistent with the decisions of a majority of circuit courts, which have rejected the application of judicial estoppel in this statutory context. Most notably, the panel's ruling is

inconsistent with the recent decisions of the D.C. Circuit (*Swanks v. WMATA*, 116 F.3d 582 (D.C. Cir. 1997); *Whitbeck v. Vital Signs, Inc.*, 116 F.3d 588 (D.C. Cir. 1997)); the Sixth Circuit (*Blanton v. Inco Alloys Int'l, Inc.*, 108 F.3d 104 (6th Cir. 1997), *supplemental opinion*, 1997 WL 525292 (6th Cir. Aug. 22, 1997)); and the Seventh Circuit (*Weigel v. Target Stores*, No. 96-3719, 1997 WL 526163 (7th Cir. Aug. 26, 1997)). Finally, as a general matter, the panel's application of judicial estoppel in this case conflicts with the prior decisions of this Court, which have been highly critical of the estoppel doctrine. *See, e.g., Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 2559 (1996); *United States v. McCaskey*, 9 F.3d 368 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1565 (1994). The panel decision, if left in place, will expand judicial estoppel beyond the narrow limits established in this Circuit.

As the agency charged to administer Title I of the ADA, the Commission has a strong interest in arguing against the adoption of legal doctrines that will unfairly deprive ADA claimants of their day in court. Because of the importance of the issues raised by this appeal to the effective enforcement of the ADA, the Commission offers its views to the court.

STATEMENT OF THE CASE

This case involves a claim of disability discrimination under the ADA. The plaintiff, Carolyn Cleveland, alleges that her former employer, Policy Management Systems Corporation ("PMSC"), terminated her employment because of her disability.

Cleveland began working for PMSC in August 1993. *Cleveland*, 1997 WL 464657 at *1. Cleveland suffered a stroke in January 1994 and took a leave of absence from work. *Id.*

Cleveland filed an application for social security disability benefits, certifying that she was " 'unable to work because of [her] disabling condition on January 7, 1994' and that she was 'still disabled.' " *Id.*

In April 1994, Cleveland's physician released her to return to work. *Id.* Cleveland resumed her job with PMSC, notifying the SSA of the change in her condition. *Id.* Cleveland encountered difficulties in performing her job, on her return to work, and asked for several accommodations that would assist her in performing the essential functions of the job. *Id.* PMSC denied all of Cleveland's requested accommodations and, in July 1994, terminated her employment, allegedly for poor performance. *Id.*

In September 1994, Cleveland renewed her application for social security disability benefits. *Id.* Cleveland represented that she " 'continue[d] to be disabled' " and that she had been terminated from her job because she " 'could no longer do the job because of [her] condition.' " *Id.* Cleveland stressed that her condition had worsened "as a consequence of her firing." *Id.* Cleveland filed a Request for Reconsideration, in January 1995, reaffirming her assertion that she was " 'unable to work' " within the meaning of the legal standards applied by the SSA. *Id.* The matter was referred to an ALJ, who awarded Cleveland disability benefits, effective retroactively to January 7, 1994. *Id.* at **1-2.

Cleveland subsequently brought suit under the ADA. PMSC moved for summary judgment, arguing that "Cleveland could not establish a prima facie case under the ADA, as her representations in her application for, and her receipt of, social security disability benefits estopped her from claiming that she

is a 'qualified individual with a disability.' " *Id.* at *2. The district court granted summary judgment on that basis. *Id.*

On appeal, a panel of this Court affirmed the district court's grant of summary judgment. The panel first rejected "a per se rule that automatically estops an applicant for or recipient of social security disability benefits from asserting a claim of discrimination under the ADA." *Id.* at *3. The panel explained that, because of the different legal standards involved, claims under the Social Security Act and the ADA "would not necessarily be mutually exclusive." *Id.* Having rejected any per se estoppel rule, the panel, nonetheless, adopted a standard that would allow for the application of estoppel in most cases in which an individual applies for or receives social security disability benefits. Specifically, the panel ruled that "the application for or the receipt of social security disability benefits creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.' " *Id.* at *4. The panel opined that an individual would be able to overcome this presumption only "under some limited and highly unusual set of circumstances." *Id.* at *3. Based on this standard, the panel ruled that Cleveland had not "raised a genuine issue of material fact to rebut the presumption that, while she remains disabled for purposes of Social Security, she is estopped from asserting that she is a 'qualified individual with a disability.' " *Id.* at *4.

ARGUMENT

This case raises important issues concerning the application of the doctrine of judicial estoppel to bar otherwise viable claims of disability discrimination under the ADA. The panel, while correctly (in our view) rejecting any absolute rule that a claim

for disability benefits under the Social Security Act bars suit under the ADA, embraced a standard that would leave aggrieved individuals without recourse under the ADA in most cases in which the individual has applied for or received social security disability benefits. For the following reasons, we urge this court to revise or withdraw the panel opinion and to hold, in accordance with the growing consensus on this issue, that the doctrine of judicial estoppel has no place in this statutory context.

I. THE PANEL'S RULING THAT AN APPLICATION FOR, OR RECEIPT OF, DISABILITY BENEFITS PRESUMPTIVELY ESTOPS AN INDIVIDUAL FROM ESTABLISHING THE QUALIFICATIONS ELEMENT OF HIS OR HER ADA CLAIM IS INCONSISTENT WITH THE POSITION OF THE SSA.

The principal ground for revising or withdrawing the panel decision is that the decision is inconsistent with the position of the SSA itself. In its opinion, the panel cited to SSA regulations and other statements by the SSA concerning the relationship between the Social Security Act and the ADA. *See Id.* at **3-4. The panel, however, did not have before it the full views of the SSA. The SSA has now made clear that, in light of the legal standards applied by the SSA in determining eligibility for disability benefits, there is no basis for applying judicial estoppel in this context.

The disability benefit programs of the Social Security Act are designed to provide a stream of income to individuals who, because of a disability, are unable to obtain jobs in "significant numbers" in the "national economy." 42 U.S.C. § 1382c(a)(3)(B). The Social Security Act contemplates a

"generalized" inquiry into the individual's "ability to find work in the national economy." *Overton v. Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992). In sharp contrast to the ADA, there is no individualized inquiry into "the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(2) (1996) (ADA regulation).

Because of the different legal standards involved, the SSA has made clear that an individual's receipt of disability benefits under the Social Security Act does not preclude a finding that the individual is a "qualified individual" within the meaning of the ADA. In a memorandum dated June 2, 1993, the SSA specifically addressed the ADA's "potential effect on the evaluation of disability under the [SSA]." *Americans with Disabilities Act of 1990 — INFORMATION*, Memorandum from the Associate Commissioner, SSA at 1. The SSA stated that, under the standards of the Social Security Act, "[t]he fact that an individual may be able to return to a past relevant job, provided that the employer makes accommodations, is not relevant to the [eligibility determination]." *Id.* at 2. The SSA stressed that, in contrast to the ADA's particularized approach to the qualifications issue, eligibility for disability benefits "is based on the functional demands and duties of jobs as ordinarily required by employers throughout the national economy," and not on "[w]hether or how an employer might be willing (or required) to alter job duties to suit the limitations of a specific individual." *Id.* at 3. The SSA concluded that, because the eligibility standards under the ADA and the Social Security Act have "no direct application to one another," a finding of "total disability" under the Social Security Act is not "synonymous" with a finding of an inability to work for purposes of the ADA. *Id.* at 1, 3.

The SSA further clarified its views on the relationship between the disability standards under the Social Security Act and the ADA in an *amicus* brief filed on February 28, 1997, in the case of *Swanks v. WMATA*, 116 F.3d 582. In that brief, the SSA stated that "[a]n application for, and an award of, social security disability benefits does not constitute an admission as a matter of law that the individual is physically unable to work, and thus it does not bar as a matter of law his claim under the ADA." *Swanks* Brief at 8. Noting that the "inquiries under the Social Security Act are . . . significantly different from the inquiries under the ADA," the SSA asserted that statements made to obtain disability benefits are "not a per se bar to an ADA claim" and "may have only limited relevance to the ADA case." *Id.* at 2, 8-9. The SSA emphasized that, in assessing eligibility for social security disability benefits, the SSA "does not consider whether the former employer, or other employers, might make a reasonable accommodation that would allow the claimant to work," *id.* at 6, 9, meaning that an individual could be "totally disabled" or "unable to work" within the meaning of the Social Security Act and still be a "qualified individual" for purposes of the ADA. According to the SSA, there is nothing "inherently inconsistent" between a plaintiff's claim for disability benefits under the Social Security Act and his claim of qualifications under the ADA. *Id.* at 8.

As the SSA has explained, there are a number of grounds for reconciling a claim for disability benefits under the Social Security Act with a claim of qualifications under the ADA. First, because the SSA does not take into account the issue of reasonable accommodation, an individual's claim that she is "totally disabled" or "unable to work," within the meaning of the legal standards applied by the SSA, is in no way inconsistent with an assertion that she could have performed the essential

functions of her prior job with accommodation. Since accommodation is a commonplace feature of most ADA cases, this difference in standards will provide a basis for reconciling the two claims in a high percentage of cases. In addition, the SSA has stated that it does not concern itself with an individual's ability to work in those cases in which benefits are awarded at step three of the SSA's sequential evaluation process, due to a listed impairment. According to the SSA, "[m]any persons with listed impairments, for example, amputations, in fact are able to work quite successfully, even though SSA would find them disabled if they decided not to work and instead sought benefits." *Swanks* Brief at 11. Finally, the SSA has explained that, as a general matter, a finding of a "total disability" does not constitute a finding, as a matter of law, that an individual is physically unable to work." *Id.* at 8. The SSA awards disability benefits to individuals who face real-world barriers to employment, even though such individuals, with job training or assistance, might be able to obtain work. *See id.* at 11; *see also* 55 SOC. SEC. BULL. 36 (Spring 1992) (stating that "[e]nabling beneficiaries with disabilities to achieve a better and more independent lifestyle by helping them take advantage of employment opportunities is one of SSA' s highest priorities").

The panel decision cannot be squared with these principles. The panel ruled that an individual who has applied for or received disability benefits is presumptively estopped from establishing that she is a "qualified individual with a disability" under the ADA. The panel implied that such a presumption was proper because only in "some limited and highly unusual set of circumstances" would the two claims "not necessarily be mutually exclusive." 1997 WL 464657 at *3. This is simply wrong. As the SSA has made clear, there is a substantial overlap between the categories of individuals protected under these two

statutory schemes. It is not the rare case in which claims under these two statutes can be reconciled. Indeed, in most ADA cases, the mere application or receipt of disability benefits will be of little relevance to the qualifications issue, given the SSA's assertion that it does not examine the issue of reasonable accommodation in determining eligibility for disability benefits. Because an individual's prior claim for disability benefits can be readily reconciled with her ADA claim, there is no basis for adopting a rebuttable presumption in favor of judicial estoppel.

Of course, there may be cases in which an individual, not only asserts that she is "totally disabled" under the standards applied by the SSA, but makes specific factual representations (*e.g.*, that she could not perform her prior job even with reasonable accommodation) that are inconsistent with her claim of qualifications under the ADA. In these cases, however, there is no need to resort to judicial estoppel. An individual who has previously sworn to facts that are specifically inconsistent with positions taken in her ADA case will have difficulty mounting a viable ADA claim. In fact, under normal summary judgment standards, an individual is bound by her prior sworn statements in the sense that such statements are given " 'controlling weight' at summary judgment unless 'the shifting party can offer persuasive reasons for believing the supposed correction.' " *See Swanks,* 116 F.3d at 587 (quoting *Pyramid Sec. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1123 (D.C. Cir. 1991)). Courts can dispose of cases in which an ADA claimant has truly taken inconsistent positions without invoking estoppel principles.

In this case, Cleveland asserted that she was "unable to work" within the meaning of the legal standards applied by the SSA. That assertion, by itself, is not inconsistent with her claim of qualifications under the ADA. While Cleveland also stated

that she " 'could no longer do the job because of [her] condition,' " 1997 WL 464657 at *1, that statement, placed in context, is not inconsistent with her claim that she could have performed the job *if PMSC had not denied her the accommodations that she sought.* In fact, Cleveland claims that her condition worsened as a result of her termination, meaning that she might have been able to perform her prior job, with an accommodation, at the time of her termination, even if she had reached the point, some months later, that she could no longer work.[1] Cleveland's assertions before the SSA are not inconsistent with her claim of qualifications under the ADA and do not, in any event, support the application of estoppel as a bar to suit.

II. THE PANEL'S ADOPTION OF A REBUTTABLE PRESUMPTION IN FAVOR OF JUDICIAL ESTOPPEL IS INCONSISTENT WITH THE DECISIONS OF A MAJORITY OF CIRCUIT COURTS.

A second ground for revising or withdrawing the panel decision is that the decision conflicts with the growing consensus, among the circuit courts, that the doctrine of judicial estoppel has no place in this statutory context. In its decision, the panel suggested that most circuit courts had invoked judicial estoppel to bar ADA claims. In fact, the case law, at the circuit court level, is stacked firmly against the panel's approach.

First, the D.C. Circuit has issued two decisions that reject

1. That assertion is not inconsistent with the fact that the SSA awarded benefits retroactively to January 1994, since, as noted above, the SSA does not ask whether an individual could have performed her prior job with accommodation. The SSA's award represents a finding that Cleveland was totally disabled, as of that date, within the meaning of the legal standards applied by the SSA, not that she was unable to work, at that point, even with reasonable accommodation.

the application of judicial estoppel in this context. In *Swanks v. WMATA*, the court rejected the view that an individual's statement to the SSA that she is "disabled and unable to work" bars her ADA claim. 116 F.3d at 587. Stressing that, "in assessing eligibility for disability benefits, the [SSA] gives no consideration to a claimant's ability to work with reasonable accommodation," the court ruled that "[a]wards of disability benefits . . . cannot bar ADA relief." *Id.* at 584, 586. The court held that, because the plaintiff had presented sufficient evidence to support a finding that he could have performed his prior job with reasonable accommodation, summary judgment was improperly granted to the employer. *Id.* at 587-88; *see also Whitbeck v. Vital Signs, Inc.*, 116 F.3d at 591-93 (relying on *Swanks* in holding that the plaintiff's statements to the SSA did not bar suit under the ADA; plaintiff presented sufficient evidence to survive summary judgment on accommodation claim).[2]

Relying on *Swanks*, the Sixth Circuit recently rejected the view that an individual's certification of a total disability, before the SSA, could support the application of judicial estoppel. *See Blanton v. Inco Alloys Int'l, Inc.*, 108 F.3d 104. In *Blanton*, the court initially ruled that a claim for disability benefits did not provide an absolute bar to suit, although it implied that judicial estoppel might apply, in this context, in some circumstances. *See* 108 F.3d at 108-10. The Commission filed a brief in support of the plaintiff's petition for rehearing, placing before the court the brief of the SSA in *Swanks* (and the *Swanks* decision itself). In response, the Sixth Circuit issued a supplemental opinion, clarifying that its prior opinion "should not be read to endorse judicial estoppel in this context." 1997 WL 525292 at *1. The

2. *Swanks* and *Whitbeck* were both decided on June 20, 1997, some two months before the panel decision. Neither case is mentioned in the panel opinion.

court stated that it agreed with D.C. Circuit's opinion in *Swanks*, "that holds that the receipt of disability benefits does not preclude subsequent ADA relief and rejects the doctrine of judicial estoppel, but does allow the consideration of prior sworn statements by the parties as a material factor." *Id.*

Finally, the Seventh Circuit has recently ruled that an individual's claim for disability benefits under the Social Security Act does not, under any circumstance, bar a claim under the ADA. *See Weigel v. Target Stores*, 1997 WL 526163 (7th Cir. Aug. 26, 1997). Noting that the apparent incongruity between the two claims is "entirely illusory because the terms 'totally disabled' and 'qualified individual with a disability' are terms of art that must be understood within their respective statutory contexts," the court ruled that an individual's statement to the SSA that she is " 'wholly unable to work,' or some other variant to the same effect," is not "conclusive as to the ADA issue [of qualifications]." *Id.* at **4-6. The court recognized, as does the Commission, that such statements are "not irrelevant to the question of whether an ADA plaintiff is a 'qualified individual with a disability' " and that, in the absence of competent evidence to the contrary, an individual's specific factual assertions before the SSA might, together with other evidence in the case, support the grant of summary judgment in favor of the employer. *Id.* at **5-6. The court ruled that, because the plaintiff failed to present competent evidence that she could have performed her prior job with reasonable accommodation, the plaintiff could not survive summary judgment. *Id.* at **6-7.

The panel indicated that the First Circuit has treated an individual's prior representations to the SSA as "binding admissions." *See* 1997 WL 464657 at *3 n.10 (citing *August v. Offices Unlimited Inc.*, 981 F.2d 576, 584 (1st Cir. 1992)). In fact, the First Circuit has since limited *August* to its narrow facts,

ruling that, in most cases of reasonable accommodation, there will be no basis for applying estoppel or treating the individual's statements to the SSA as preclusive. *See D'Aprile v. Fleet Servs. Corp.*, 92 F.3d 1, 4-5 (1st Cir. 1996). The panel also stated that the Sixth and Seventh Circuits have invoked judicial estoppel to bar ADA claims. *See* 1997 WL 464657 at *3 n.10. As noted above, both of these courts have now rejected the doctrine in this statutory context. While the panel suggested that the Eighth Circuit has applied a form of fact-based estoppel, based on statements to the SSA, that court, in a recent case, stated that the issue "remains open in our Circuit." *Dush v. Appleton Elec. Co.*, No. 96-3289, 1997 WL 530542, *4 n.8 (8th Cir. Aug. 28, 1997). Finally, the panel drew support from the Ninth Circuit's decision in *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996). In *Rissetto*, the court applied judicial estoppel but in a case involving a claim of age (not disability) discrimination, where the plaintiff had certified to a total inability to work in a workers' compensation proceeding (not before the SSA). The court simply assumed that, in that particular context, the two claims were inconsistent. In this statutory context, where the issue of reasonable accommodation, in particular, differentiates the issue of coverage under the two statutes, the Ninth Circuit has ruled that an individual's claim of "total disability" under the SSA, while relevant to the issue of qualifications, is not conclusive.[3] *See Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1479-82 & n.3 (9th Cir. 1996) (declining to apply the doctrine of judicial estoppel).

Contrary to the panel's suggestion, the circuit court

3. We also note that the Tenth Circuit has, in general, rejected the doctrine of judicial estoppel. *See, e.g., In re Osborn*, 24 F.3d 1199, 1207 n.11 (10th Cir. 1994); *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1520 n.10 (10th Cir. 1991); *United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986); *Parkinson v. California Co.*, 233 F.2d 432, 437-38 (10th Cir. 1956).

precedent strongly militates against the application of judicial estoppel, in any form, in this statutory context. In fact, the only circuit court decision to have embraced the doctrine in this context, *McNemar v. The Disney Store, Inc.*, 91 F.3d 610 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997), was issued before the views of the SSA were clearly understood and, thus, stands as questionable precedent. *See Swanks*, 116 F.3d at 587 (criticizing *McNemar*). This Court should hold, in accordance with the growing consensus on the estoppel issue, that judicial estoppel does not apply in this statutory context.

III. THE PANEL'S EXPANSIVE APPLICATION OF JUDICIAL ESTOPPEL IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

A final ground for revising or withdrawing the panel decision is that the decision expands the doctrine of judicial estoppel beyond the narrow limits set by this Court. This Court has never been a champion of judicial estoppel. This Court has described judicial estoppel as an " 'obscure doctrine,' " *United States v. McCaskey*, 9 F.3d at 378, "lacking 'defined principles' and subject to criticism as 'basically an ad hoc decision in each case.' " *Nichols v. Scott*, 69 F.3d at 1272. This Court has applied the doctrine sparingly to prevent individuals from " 'playing fast and loose' with the courts," *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996), but only when the statements at issue are "significantly inconsistent." *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268-69 (5th Cir. 1988).

This Court, in fact, has strongly suggested that the doctrine of judicial estoppel, as its name implies, applies only in the context of *judicial* proceedings. This court has stated that judicial estoppel is designed " 'to protect the integrity of the judicial process.' " *Grant v. Lone Star Co.*, 21 F.3d 649, 651 n.2 (5th

Cir.), *cert. denied*, 115 S. Ct. 574 (1994). Specifically, the doctrine "minimizes the danger of a party contradicting a court's determination based on the party's prior position," thereby resulting in "inconsistent court determinations." *United States ex. rel. Am. Bank v. C.I.T. Constr. Inc.*, 944 F.2d 253, 258-59 (5th Cir. 1991). The doctrine is applied when an individual has taken inconsistent positions before two courts, thereby posing a "threat to judicial integrity" by creating the probability that " 'one court has . . . been misled.' " *Id.* at 258 (quoting *USLIFE Corp. v. U.S. Life Ins. Co.*, 560 F. Supp. 1302, 1305 (N.D. Tex. 1983)); *see also Dockery v. North Shore Medical Ctr.*, 909 F. Supp. 1550, 1558 (S.D. Fla. 1995) (relying, in part, on Fifth Circuit precedent in holding that judicial estoppel "should not be applied to oaths undertaken in administrative filings" since "undertaking such an oath in an administrative filing and then later attempting to take a different position in a court of law, does not threaten the integrity of the judicial system").

Given these standards, this case is wholly unsuitable for the application of judicial estoppel. As noted above, in the vast majority of cases, there will be no inconsistency between an individual's claim for social security disability benefits and his claim of qualifications under the ADA. Even assuming, however, that such inconsistency exists, judicial estoppel should not be extended to administrative filings. If an individual has lied under oath before the SSA, the SSA has the tools at its disposal to pursue a case of perjury against the malfeasant. *See Dockery*, 909 F. Supp. at 1559 n.16. If the individual is misrepresenting the facts in his ADA case, the normal tools of the adversarial process, (*e.g.*, discovery, cross-examination, and impeachment) can ferret out the truth. In light of the important public policies at stake (*e.g.*, the widespread dismissal of otherwise viable claims of disability discrimination), this Court should not choose this statutory context to expand the doctrine of judicial estoppel beyond its narrow limits.

Appendix D

CONCLUSION

The panel correctly rejected any "per se rule that automatically estops an applicant for or recipient of social security disability benefits from asserting a claim of discrimination under the ADA." 1997 WL 464657 at *3. The panel erred, however, in adopting a rebuttable presumption in favor of estoppel, a standard that would effectively result in the application of judicial estoppel as an absolute bar to suit in most ADA cases in which the plaintiff has applied for or received social security disability benefits. This Court should revise or withdraw its opinion on the estoppel issue.

Respectfully Submitted,
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Appendix D

CERTIFICATE OF SERVICE

I, Robert J. Gregory, hereby certify that on this 5th day of September, 1997, two copies of the attached brief were sent by overnight mail, postage prepaid, to each of the following counsel of record:

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s/ Robert J. Gregory
Robert J. Gregory

Appendix D

ADDENDUM

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-7078

MICHAEL SWANKS,

Plaintiff-Appellant,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The United States files this brief as *amicus curiae* on behalf of the Social Security Administration (SSA), in response to this Court's *sua sponte* order of January 27, 1997, inviting SSA to file an *amicus* brief in this appeal within 30 days. The order provided that the brief "may address but need not be limited to" two specific questions, namely:

> (1) whether [SSA] accounts for the possibility of reasonable accommodation under the Americans with Disabilities Act ("ADA") by the prior employer,

Appendix D

> or by employers in the available labor market, when making a disability determination, and (2) what adjustments (if any) [SSA] would make to a person's disability status or benefits as a result of an ADA-related reinstatement or damage award.

Although the Court asked only these two fairly narrow questions, we think it would be useful, as the Court also suggested, that our brief "not be limited to" those questions, but rather that it also address the underlying question of the overall nature of the relationship between a prior award of social security (or supplemental security income) disability benefits and a claim against a former employer under the ADA. On that underlying question, the courts have reached a variety of inconsistent conclusions, ranging from the idea that any social security claim absolutely bars any ADA claim, see *McNemar* v. *The Disney Store, Inc.*, 91 F.3d 610, 617-18 (3rd Cir. 1996), to the idea that the two schemes are so different that the social security claim would have little effect on the ADA claim, see *Overton* v. *Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992); *Smith* v. *Dovenmuenle Mortgage, Inc.*, 859 F.Supp. 1138, 1141-42 (N.D. Ill. 1994). Our view is that a claim for social security disability benefits has several significant differences from a claim under the ADA, and therefore a prior social security benefit claim and award is not a per se bar to an ADA claim. In some cases, however, specific statements made by the claimant or findings made by SSA in connection with a disability claim might be relevant to the issue before the court in the ADA case concerning the plaintiff's ability to perform the essential functions of his prior job.

Appendix D

STATUTES AND REGULATIONS

The pertinent statutes and regulations (including internal SSA materials) are reproduced in the addendum.

STATEMENT

1. ***Social Security Disability Determination.*** Two programs operated by SSA determine whether an individual is entitled to benefits on the basis of the same definition of disability. Both Title II, which provides benefits, and calculates their level, based on the individual's prior work record, see 42 U.S.C. 423, and Title XVI (also known as Supplemental Security Income, or SSI), which provides benefits for the indigent, see 42 U.S.C. 1382, define disability for adults as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months * * *." 42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A). Under both programs,

> [a]n individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B).

Appendix D

SSA has adopted these requirements into a five-step sequential evaluation process that it applies to each claim made by an adult. See *Bowen* v. *Yuckert*, 482 U.S. 137, 140-142 (1987). At step one, SSA determines if the claimant engaged in "substantial gainful activity;" if so, the claim is denied. 20 C.F.R. 404.1520(b), 416.920(b). At step two, SSA determines whether the claimant has a severe impairment, that is, a medical impairment that significantly limits his ability to do basic work activities; if not, the claim is denied; if so, he proceeds to the next step. 20 C.F.R. 404.1520(c), 404.1521, 416.920(c), 416.921. At step three, SSA determines whether the claimant has an impairment that meets or equals any of the impairments described on a list located at 20 C.F.R. Part 404, Subpart P. App. 1. These are impairments of a nature and of a level of severity that SSA will presume that anyone who meets or equals one or more of the listings is unable to work and thus will be awarded benefits. 20 C.F.R. 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, 416.926.

If the claimant does not meet or equal a listing, he proceeds to step four, where SSA determines whether he can still perform his "past relevant work," that is, "the physical and mental demands of the kind of work you have done in the past;" if he can do so, SSA will deny benefits. 20 C.F.R. 404.1520(e), 404.1560(b), 416.920(e), 416.960(b). If he cannot do his past relevant work, SSA proceeds to step five, where it will determine whether the impairment prevents the claimant from performing any other type of work which exists in significant numbers in the regional or national economy, taking into account the vocational factors of age, education, and prior work experience. 20 C.F.R. 404.1520(f), 404.1560(c), 416.920(f), 416.960(c).

2. ***Facts.*** One year after plaintiff was discharged from his

job as a special police officer for the Washington Metropolitan Area Transit Authority (WMATA), he applied for social security disability benefits (Title II). His claim was denied at the ini al and reconsideration stages, but an administrative law judge, after a hearing, awarded the benefits (App. 18a-18d). The ALJ concluded that his impairment, a congenital abnormality of the spine which creates urinary incontinence, does not meet or equal any listed impairment. The ALJ concluded that it does, however, leave him unable to perform his past relevant work or any other work which exists in significant numbers in the regional or national economy, principaliy because it prevents him from engaging in frequent contact with other persons (*ibid.*). The ALJ thus awarded benefits retroactive to the month in which he left his job at WMATA, October 1992.

While his social security claim was pending, plaintiff also sued WMATA under the Americans with Disabilities Act, claiming that WMATA failed to make a reasonable accommodation for his disability; according to his brief to this Court, plaintiff requested 10 minute exercise periods each hour, which would enable him to maintain better control of his bladder. WMATA moved for summary judgment, arguing that plaintiff's receipt of social security disability benefits constitutes an admission that he is physically unable to work, and thus it bars as a matter of law his claim under the ADA that he is able to continue in his job, despite his medical impairments, with or without a reasonable accommodation. The district court agreed and granted summary judgment to WMATA (App. 97-103). It held that plaintiff failed to make a prima facie case that he is a "qualified individual with a disability" and thus eligible to make a claim under the ADA, see 42 U.S.C. 12112(a), because his claim for social security disability benefits is a binding admission that he cannot perform the essential functions of his job, either

with or without a reasonable accommodation (Order at 5-6, App. 101-102).

SUMMARY OF ARGUMENT

1. A successful claim for social security benefits is not an absolute bar to the ADA claim. The significant differences between those types of claims mean that the social security claim may have only limited relevance to the ADA case.

a. A strong basis to distinguish social security from ADA is that SSA does not consider whether the former employer, or other employers, might make a reasonable accommodation that would allow the claimant to work. SSA does not wish to speculate about what employers might do but did not in fact do to provide reasonable accommodations.

b. Another substantive difference between the claims is that SSA may award benefits at step three, based only on the showing that the claimant has a listed impairment, without considering his residual functional capacity or his ability to do past relevant work, or at step 5, where vocational factors (age, education and work experience) could be the deciding factors. Moreover, the ADA court should remember that under Title II, a Beneficiary can return to work for a 9-month trial period and still continue to receive his disability benefits.

2. A claimant's representations to SSA when showing at step four that he is unable to perform his actual past relevant work, however, can be relevant to the ADA claim, which can raise a similar factual issue. But the ADA court must look carefully at the social security record, since there can be specific factual differences in the two cases.

3. A reinstatement order, if the ADA plaintiff then returns to work, would trigger the 9-month trial period for Title II beneficiaries. Otherwise, a return to work would be substantial gainful activity and thus require that SSA terminate benefits. Back pay would not require a repayment of past benefits, since the award does not represent actual work performed.

ARGUMENT

AN APPLICATION FOR AND AWARD OF SOCIAL SECURITY DISABILITY BENEFITS IS NOT A PER SE BAR TO A CLAIM UNDER THE AMERICANS WITH DISABILITIES ACT, BUT IT MAY BE RELEVANT EVIDENCE IN THE ADA CASE

Claims for social security disability benefits and claims under the ADA have a number of significant differences. Yet they do share at least one common premise: both can require a finding as to whether the claimant is able to perform the essential functions of his former job. Thus, the record in the social security proceeding can be relevant to the ADA claim. On the other hand, there can be major distinctions between what is at issue in the social security proceeding and what is at issue in the ADA proceeding that make it possible to reconcile the two claims. The court deciding a later ADA claim thus must be sensitive to the similarities and differences. It should not, as the district court did here, simply find that the claimants positions are inherently inconsistent and thus reject his ADA claim on its face. An application for, and an award of, social security disability benefits does not constitute an admission as a matter of law that the individual is physically unable to work, and thus it does not bar as a matter of law his claim under the ADA.

1. At least one circuit has held that the mere fact that an individual has applied for social security benefits and has sworn that he is disabled, and that SSA accepted that application, is so entirely inconsistent with a later ADA claim that it absolutely bars the ADA claim under a theory of judicial estoppel. See *McNemar v. The Disney Store. Inc.*, 91 F.3d 610, 617-18 (3rd Cir. 1996) (applying strict judicial estoppel in social security/ ADA context). As a general matter, this circuit does not accept judicial estoppel. See *UMWA 1974 Pension v. Pittston Co.*, 984 F.2d 469, 477 (D.C. Cir.), *cert. denied*, 113 S.Ct. 3039 (1993), citing *Konstantinidis v. Chen*, 626 F.2d 933 (D.C. Cir. 1980) (rejecting judicial estoppel doctrine). But even under a judicial estoppel theory, an absolute bar on the ADA claim fails to recognize that the inquiries under the Social Security Act are so significantly different from the inquiries under the ADA that the social security proceeding may have only limited relevance to the ADA case.

a. One strong distinction between a social security claim and an ADA claim is the one raised by this Court in its first question to SSA: the manner in which SSA treats a possible reasonable accommodation by the employer that is the defendant in the ADA case, or by other employers. Often in an ADA case, including the present case, one of the plaintiff's contentions is that, even if he could not perform the job as the employer actually has structured it, he could perform the essential functions of the job if the employer made a reasonable accommodation. While the effect of a reasonable accommodation on the claimant's ability to perform his past job is thus often crucial to an ADA case, it is SSA's policy that, when evaluating the claimant's ability to perform his past relevant work at step four of the sequential evaluation process, it will not consider the possibility that the employer might make such a change in the working

environment, if the employer has in fact not done so. Moreover, at step five, when SSA considers whether the claimant could perform other work which exists in significant numbers in the economy, it will look only at the actual jobs in the market, not at changes that employers might make in those jobs to meet their obligations under the ADA.[1]

This position reflects the regulatory definition of "past relevant work," which simply provides that SSA will compare the claimant's "residual functional capacity" with "the physical and mental demands of the kind of work you have done in the past." 20 C.F.R. 404.1560(b), 416.960(b); cf. 20 C.F.R. 404.1573(c), 416.973(c) (special conditions). A reasonable accommodation that the employer did not in fact provide would not fit this definition. SSA does not decide cases on the basis of speculation as whether the employer might be persuaded to adopt some alteration in the work, or might eventually be ordered to do so in a suit under the ADA. Since a large proportion of ADA cases, including this one, are based on a dispute over reasonable accommodations, rather than on whether the plaintiff is able to work even without any accommodation, this factor is one of the most important differences between social security and ADA claims.

b. Another substantive difference between social security and the ADA that can allow for granting disability benefits while still allowing relief under the ADA involves the criteria on which SSA allows benefits in some cases. As we explained *supra*, SSA can award benefits at step three of the sequential evaluation process, without reaching step four, if the claimant's impairment

1. This policy was announced by Associate Commissioner Daniel Skolar in a June 2, 1993 memorandum (attached as addendum, *infra*).

is of a type, and of the severity, that is listed in the regulations as presumptively disabling. Since SSA does not make an inquiry at step three of the claimant's ability to do his past work, his residual functional capacity, or his vocational factors (age, education and work experience), an award of benefits on that basis is not necessarily inconsistent with an ADA claim. Many persons with listed impairments, for example amputations, in fact are able to work quite successfully, even though SSA would find them disabled if they decided not to work and instead sought benefits.

Other claimants are allowed benefits at step five, based upon a finding that the claimant cannot perform other kinds of work that exist in significant numbers in the economy. While SSA does examine at step five the claimant's residual functional capacity, that is, the limitations on his ability to work that are caused by his medical condition, it also must consider the claimant's vocational factors, that is, his age, education, and work experience. Thus, SSA can award benefits to an individual who is able to perform sedentary, light, or even medium work, if his age, education, and lack of transferrable skills from past employment make it unlikely that he could adjust to other work for which he is otherwise qualified. See *Heckler v. Campbell*, 461 U.S. 458 (1983). A finding that the claimant satisfies step five on that basis is of little if any relevance to an ADA claim.

c. Another distinguishing factor is that the social security Title II program has a 9-month trial work period (which need not be consecutive months), during which an individual can continue to receive full benefits while also working. See 42 U.S.C. 422(c), 423(e)(1); 20 C.F.R. 404.1592. This is one situation where the social security program provides, as a work incentive, that a person can simultaneously be considered

disabled for its purposes and thus entitled to benefits, while also actually working. Because of the trial work program, beneficiaries will be less likely to be discouraged from trying to get back into the workforce, since they would not need to fear that, by trying to work, they will lose their reliable means of financial support from the benefits. The ability of a social security claimant to work while maintaining benefits for this 9-month period thus tends to show that a finding of disability need not be a finding that the individual cannot satisfy the work related requirements of the ADA.

2. The claimant's representations to SSA on the factual issues in support of an application for disability benefits, particularly at step four of the sequential evaluation process, where the ability to perform prior work is considered, and SSA's findings on them when awarding benefits, nevertheless can be relevant to a subsequent ADA claim. Both at step four of the social security process and in the ADA claim, factual issues can arise as to the claimant's ability to perform his prior job, despite his medical impairment. The ADA court may take into account the statements and findings made in the social security proceeding as relevant evidence of the claimant's ability to perform the essential functions of his job, as long as those statements and findings specifically address these functions (and they are otherwise admissible). As we explained *supra*, at step four of its five-step sequential evaluation process, SSA denies benefits unless the claimant shows that he is unable to perform his actual past relevant work. See Social Security Ruling 82-61 (reprinted in the addendum). That inquiry bears some similarity to an issue in the ADA case and the court in the ADA case thus can consider that fact

On the other hand, however, there can be specific factual

differences between the two claims that the ADA court can rely upon to still rule in the plaintiff's favor. See, e.g., *D'Aprile v. Fleet Services Corp.*, 92 F.3d 1, 4-5 (1st Cir. 1996) (reconciling private disability insurance claim with ADA claim on the facts); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996) (finding specific factual inconsistencies between SSA and ADA claims). The court should not do as the 3rd Circuit did in *McNemar*, that is, rely simply on the fact that the claimant signed a standard form saying that he is unable to work. Rather, it must look at exactly what the record shows in the social security case, and what SSA found.

3. The Court's second question to SSA concerned the adjustments SSA would make in a claimant's benefits status should he receive reinstatement or back pay under the ADA. If the claimant accepts the reinstatement order and actually returns to work, and the job pays more than $500 a month, that work will presumably constitute substantial gainful activity. See 20 C.F.R. 404.1572, 404.1574. It will thus trigger the 9-month trial work period for Title II beneficiaries that we described *supra* (assuming that the claimant has not already exhausted that trial work period with other jobs), during which the individual can work and still keep the benefits. At the end of the trial work period, the substantial gainful activity would then require termination of the benefits. See 42 U.S.C. 423(d)(1)(A), (e)(1). SSI recipients could also be disqualified because their income exceeds the program's limits. Should the plaintiff for some reason establish to the court in the ADA case that he was medically capable of performing his past job (even without any reasonable accommodation, as we explained *supra*), but the court for some other reason denies reinstatement (for example, because he would have later been laid off), or the plaintiff declines to return to work, even after the court has ordered

reinstatement, and does not otherwise resume working, the court's finding might be used as evidence by SSA in a continuing disability review to determine whether the claimant remains disabled, operating under the same principles concerning the similarities and differences between the programs that we have already outlined. See 42 U.S.C. 423(f). The finding by the ADA court would not, however, be binding on SSA. See 20 C.F.R. 404.1504.

As for the back pay award, since this is a payment for work that the claimant did not actually perform (because he was wrongly denied the opportunity to work), it does not constitute some sort of retroactive substantial gainful activity that would make prior benefit payments erroneous and subject to reimbursement as an overpayment. The regulations define substantial gainful activity by looking not at whether the claimant received income linked to some time period, but rather at whether the claimant actually performed some work. See 20 C.F.R. 404.1572(b) ("work activity that you do for pay or profit"), 404.1574 (a) (1) ("earnings from work you have done"). A large lump-sum back pay award might, however, constitute a financial asset that would prevent a claimant for SSI benefits from meeting the income and resources limitations for those poverty-based benefits, at least until the claimant depleted the funds. See 20 C.F.R. 416.1100. Plaintiff in the present case, however, sought and obtained Title II benefits, not SSI benefits.

CONCLUSION

This Court should vacate the decision of the district court and remand for further proceedings in light of the principles outlined above.

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FEBRUARY 1997

Appendix D

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No. 97-1008

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In The

Supreme Court of the United States

October Term, 1997

CAROLYN C. CLEVELAND,

Petitioner,

vs.

POLICY MANAGEMENT SYSTEMS CORP.; GENERAL INFORMATION SERVICES, a Division of Policy Management Systems Corporation; and CYBERTEK CORP.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

1. Whether the Court of Appeals appropriately affirmed summary judgment denying a claim under the Americans with Disabilities Act, holding that the application for or receipt of social security disability benefits creates a rebuttable presumption that the claimant is judicially estopped from asserting that he or she is a "qualified individual with a disability," and that the claimant in this case, who continuously and unequivocally represented to the Social Security Administration that she was disabled and completely unable to work, failed to raise a genuine issue as to the existence of any material fact which would rebut the presumption.

LIST OF PARTIES

The names of all parties appear in the caption of this case.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 120 F.3d 513 (5th Cir. 1997), affirmed the decision of the United States District Court for the Northern District of Texas, which granted summary judgment in favor of the Respondents on September 6, 1996. The Fifth Circuit denied Petitioner's Petition for Rehearing on September 15, 1997.

JURISDICTION

The Court of Appeals affirmed the District Court's judgment on August 14, 1997. Petition for Rehearing and Suggestion for Rehearing En Banc were denied by the Court of Appeals on September 15, 1997. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1) (1993). The Court of Appeals had jurisdiction of this matter under 28 U.S.C. § 1291 (1993), as an appeal from a final judgment of the District Court. The District Court had jurisdiction to hear the merits of Petitioner's claims under 28 U.S.C. § 1331 (1993).

STATEMENT OF THE CASE

Carolyn Cleveland ("Cleveland") brought this action against her former employer Policy Management Systems

Corporation ("PMSC")[1] claiming that she was terminated in violation of the Americans With Disabilities Act.

Cleveland was hired by PMSC on August 30, 1993, to perform telephonic background checks on prospective employees of PMSC's clients. (R.I 86-87). On January 7, 1994, Cleveland had a stroke[2] and took a leave of absence from PMSC. (R.I 88). On January 21, 1994, Cleveland filed for Social Security disability benefits and specifically represented to the Social Security Administration that she had a disabling condition dating from January 7, 1994. (R.II 387, 394).

On January 26, 1994, Cleveland signed a formal application for Social Security disability benefits and specifically stated the following:

> I became unable to work because of my disabling condition on January 7, 1994.
>
> I am still disabled.
>
> I know that anyone who makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime. . . . I affirm that all information I have given in connection with this claim is true.

(R.II 394-397).

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[1] Cleveland also sued General Information Systems ("GIS") and Cybertek. GIS was never a separate entity from PMSC and Cleveland never worked for Cybertek. (R.I 5)

[2] Cleveland states she suffered a stroke "during the course and scope of her employment." Petition p. 4. While Cleveland may have had a stroke while working, there is no evidence that her stroke was caused by her work.

Cleveland also executed at that time a medical authorization to enable the Social Security Administration to obtain information to "evaluate my claim for benefits under the Social Security Act." (R.II 398). Cleveland continued to supply information in support of her claim for disability benefits, and, in March of 1994, provided a Supplemental Questionnaire and vocational report to the Social Security Administration. (R.II 399-408).

On April 11, 1994, Cleveland returned to her job, working only half days. (R.I 88). On April 25, 1994, she returned to full duty. (R.I 88). Meanwhile, the Social Security Administration forwarded Cleveland's claim to the Texas Rehabilitation Commission ("TRC"), which requested additional information from Cleveland on April 20, 1994. (R.II 409). After the TRC attempted to contact Cleveland to obtain information about her claim, she informed the TRC that she returned to work in April. (R.II 409). The Social Security Administration's file does not contain any requests from Cleveland in which she withdrew her claim for benefits or asserted that she did not have a disability. (R.II 56-386).

Despite numerous attempts to help Cleveland and to train her, she could not perform her job. (R.II 14, 254). On July 15, 1994, Cleveland was terminated for poor job performance.[3] (R.I 91).

---

[3] PMSC denies any implication by Cleveland that she was terminated "because of her condition." Petition p. 7. Cleveland was terminated not because she had a stroke, but simply because of poor job performance. (R.I 91)

On July 11, 1994, the Social Security Administration denied Cleveland's request for benefits. (R.II 136, 142). On September 14, 1994, Cleveland filed a Request for Reconsideration and represented to the Social Security Administration "I disagree with the determination made on my disability. . . . I continue to be disabled." (R.II 414). Cleveland's statement that she "continue[d]" to be disabled is consistent with her representations that she was disabled beginning January 7, 1994, and not just since termination.[4]

On September 20, 1994, Cleveland filed a form with the Social Security Administration stating that she "worked 3 months or less and stopped because of my injury or illness." (R.II 416). She also stated in her own handwriting that she was terminated "because I could no longer do the job because of my condition." (R.II 417).

In September 1994, Cleveland's neurologist, Dr. Steven Herzog, stated that Cleveland "suffered with a stroke on 1/7/94 causing aphasia. This has produced complete disability." (R.II 314). Dr. Herzog classified Cleveland as "100% disabled."[5] (R.II 314). Dr. Herzog's

---

[4] Cleveland's Petition asserts that "[i]t was only after, and as a result of, the termination (which caused the worsening of her condition) that Cleveland actively pursued and received Social Security disability benefits." Petition p. 11. The record consistently proves that Cleveland uniformly stated that her disability began on the date of her stroke, January 7, 1994, not some time after her termination from PMSC. (R.II 394-397, 417, 421). As a result, Cleveland was awarded benefits retroactive to January 7, 1994. (R.II 434).

[5] Cleveland contends that Dr. Herzog expected her to recover completely. However, none of the information Dr. Herzog produced to the Social Security Administration indicates that Cleveland was expected to fully recover. (R.II 56-386).

records were provided to the Social Security Administration. (R.II 314).

On November 11, 1994, Cleveland stated to Cary Conaway, Ph.D. of the TRC that she was at the examination "[t]o get my disability." "When asked why she had applied for disability benefits, Ms. Cleveland responded, 'I had a stroke in January 1994; I went back to work but I couldn't work.' " (R.II 421). On November 30, 1994, the Social Security Administration denied Cleveland's request for benefits. (R.II 219, 224).

On January 1, 1995, Cleveland signed a further Request for Reconsideration to the Social Security Administration stating that "I am unable to work due to my disability." (R.II 430).

On May 10, 1995, Cleveland requested a hearing in front of an Administrative Law Judge representing "I am unable to work due to my disability." (R.II 433).

On May 12, 1995, Cleveland's treating physician, Bob L. Gant, stated, "I believe this patient is permanently and completely disabled from any productive work." (R.II 75). These records were provided to the Social Security Administration. (R.II 75).

On September 29, 1995, the Administrative Law Judge, Harold G. Adams, concluded that Cleveland "became disabled on January 7, 1994 and continues to be disabled through the date of this decision." (R.II 434). He

further ordered that "the claimant is entitled to a period of disability commencing January 7, 1994. . . . " (R.II 434-35).

All of Cleveland's representations to the Social Security Administration indicate that she is disabled and that, despite her brief attempt, she could not work. (R.II 56-386). Cleveland consistently stated that her disability began in January 1994. (R.II 56-386). She never stated to the Social Security Administration that her disability began after her termination from PMSC. (R.II 56-386).

The Fifth Circuit found that Cleveland continuously, unambiguously and unequivocally represented to the Social Security Administration that she is totally disabled and unable to work. *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513, 518 (5th Cir. 1997). Because of these representations (and the absence of proof to the contrary), Cleveland was unable to overcome the rebuttable presumption that she was able to perform the essential functions of her job. *Id.* at 518-19. Therefore, Cleveland could not establish a prima facie case under the Americans With Disabilities Act. *Id.* As the Fifth Circuit noted, in order to prove that she could perform the essential functions of her job, Cleveland would have to disavow her previous sworn representations creating "a factual impossibility and a legal contradiction." *Id.*

REASONS FOR DENYING THE WRIT

The Circuit Courts of Appeal which have considered the issue before the Court unanimously agree that a claimant's sworn assertions made to the Social Security

Administration ("SSA") are relevant in assessing whether he is a qualified individual with a disability under the Americans With Disabilities Act ("ADA"). Even those Circuits reluctant to hold that the claimant is "judicially estopped" from asserting that he can perform the essential functions of his job because of inconsistent statements to the SSA, acknowledge that the claimant's assertions are relevant, material evidence in determining whether the claimant can establish a prima facie case. Regardless of whether the court applies judicial estoppel or simply uses a traditional summary judgment analysis, the Circuits uniformly make their decisions based upon the claimant's assertions in light of all of the available evidence.

Further, each court considers the claimant's assertions and decides on a case by case basis whether the assertions are strong enough to preclude him from establishing that he can perform the essential functions of his job. Each case turns upon what representations were made to whom, when, and for what purpose. After reviewing the content and context of the statements, each court must determine whether the representations preclude a finding that the individual was capable of performing the essential functions of his job at the time of the alleged discrimination. Thus, review by this Court of the present case will not eradicate the need in the future for the case by case factual analysis employed to resolve this and similar claims.

The Fifth Circuit's decision is reasonable and appropriate. The court recognized the inconsistency in being totally disabled and unable to work, yet simultaneously able to perform the essential functions of the job. The

court also recognized that in some situations a Social Security disability recipient could be capable of performing the essential functions of his job. Thus, the court declined to adopt a per se bar resulting from an application for or receipt of disability benefits, and instead held that such application or receipt creates a rebuttable presumption that the recipient is judicially estopped from claiming that he is a qualified individual with a disability. In this case, the Fifth Circuit analyzed Cleveland's representations in the context of all of the summary judgment evidence. Because the Fifth Circuit assumed that Cleveland truthfully represented her complete and total inability to work to the SSA, she was unable to overcome the rebuttable presumption created by her consistent and unambiguous representations. The Fifth Circuit's opinion protects the integrity of the justice system while insuring that a claimant who has not made inconsistent representations can proceed with an ADA claim.

I. The Circuit Split is More Form Than Substance.

Virtually all Circuit Courts of Appeal have considered the impact a claimant's representations to the SSA or similar entities have on an ADA claim.[6] While on the

[6] *See, e.g., August v. Offices Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1992); *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 619 (3rd Cir. 1996), *cert denied*, 117 S. Ct. 958 (1997); *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513, 518 (5th Cir. 1997); *Griffith v. Wal-Mart Stores*, No. 96-6361, 1998 WL 29870 (6th Cir. 1998); *Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997); *Dush v. Appleton Electric Co.*, 124 F.3d 957 (8th Cir. 1997); *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996); *Talavera v. School Board of Palm Beach County*, 129 F.3d 1214 (11th Cir. 1997); *Swanks v. Washington Metropolitan Transit Authority*, 116 F.3d 582 (D.C. Cir. 1997); *see also Simon v. Safelite Glass Corp.*, 128 F.3d 68 (2nd Cir. 1997) (Deciding the impact a claimant's representations to the SSA have on an ADEA claim.).

surface there may appear to be a Circuit split, the split is more form than substance. Specifically, the Circuits agree on the three key issues. First, application or receipt of Social Security disability benefits does not create a per se bar which would automatically prohibit a claimant from establishing that he can perform the essential functions of his job.[7] Second, a claimant's representations to the SSA are material and relevant in assessing whether he is a qualified individual with a disability.[8] Third, a claimant's representations to the SSA can be so strong and persuasive that summary judgment for the employer is appropriate.[9] Therefore, while courts use different labels in

[7] *See, e.g., D'Aprile v. Fleet Services Corp.*, 92 F.3d 1, 5 (1st Cir. 1996); *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503 n.5 (3rd Cir. 1997); *Cleveland*, 120 F.3d at 517; *Griffith v. Wal-Mart Stores*, No. 96-6361, 1998 WL 29870 (6th Cir. 1998); *Weigel*, 122 F.3d at 467; *Dush*, 124 F.3d at 960; *Kennedy*, 90 F.3d at 1481 n.3; *Talavera*, 129 F.3d at 1220; *Swanks*, 116 F.3d at 583. *See also Simon*, 128 F.3d at 72-73.

[8] *See, e.g., August*, 981 F.2d at 581-82; *McNemar*, 91 F.3d at 618; *Cleveland*, 120 F.3d at 516; *Griffith v. Wal-Mart Stores*, No. 96-6361, 1998 WL 29870 (6th Cir. 1998); *Weigel*, 122 F.3d at 467-68; *Dush*, 124 F.3d at 963; *Kennedy*, 90 F.3d at 1481; *Talavera*, 129 F.3d at 1220; *Swanks*, 116 F.3d at 587. *See also Simon*, 128 F.3d at 72.

[9] *See, e.g., August*, 981 F.2d at 582; *McNemar*, 91 F.3d at 619; *Cleveland*, 120 F.3d at 519; *Griffith v. Wal-Mart Stores*, No. 96-6361, 1998 WL 29870 (6th Cir. 1998); *Weigel*, 122 F.3d at 469; *Dush*, 124 F.3d at 963; *Kennedy*, 90 F.3d at 1482; *Talavera*, 129 F.3d at 1220; *Swanks*, 116 F.3d at 587. *See also Simon*, 128 F.3d at 74.

their case analysis, they agree on the essential components for the factual examination of each case.[10]

Most of the Circuits have been asked to decide whether a claimant who has, under penalty of perjury, represented that he is totally disabled, or unable to work, or made any other similar statements, can simultaneously establish that he is capable of performing the essential functions of his job. The Circuits have unanimously held that the outcome depends upon the claimant's representations in the factual context of each case. *See, e.g., Dush v. Appleton Electric Co.*, 124 F.3d 957, 965 (8th Cir. 1997) (ADA plaintiff who had characterized herself as totally disabled in a previous workers' compensation proceeding failed to present evidence showing that she was a qualified individual with a disability.) The Circuits agree that the representations a claimant makes in order to receive disability benefits are relevant, material evidence in determining whether the claimant can establish a prima facie case under the ADA.[11] *See Talavera v. School Board of*

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[10] The EEOC agrees that a claimant's representations made in connection with an application for benefits are relevant to the determination of whether a person is a qualified individual with a disability. The EEOC does not, however, believe that such representations should be determinative. Under the EEOC's guidelines, it is inconceivable that summary judgment would ever be appropriate, no matter how strong the inconsistent representation. EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a "Qualified Individual with A Disability" Under The Americans With Disabilities Act of 1990 at 1, 10 (Feb. 12, 1997).

[11] To establish a prima facie case under the ADA, a claimant must prove (1) that she was disabled within the meaning of the ADA, (2) that her work performance met her employer's legitimate expectations, (3) that she was discharged [or subjected to some other adverse employment action], and (4) that the circumstances surrounding [the adverse action] indicate that it is more likely than not that her disability was the reason for these adverse actions." *Weigel v. Target Stores*, 122 F.3d 461, 465 (7th Cir. 1997) (quoting *Leffel v. Valley Financial Services*, 113 F.3d 787, 792-94 (7th Cir.), *cert. denied*, 118 S. Ct. 416 (1997)).

Palm Beach County, 129 F.3d 1214, 1220-21 (11th Cir. 1997) ("Whether in any particular situation there is an inconsistency between applying for SSD benefits and bringing an ADA claim will depend upon the facts of the case, including the specific representations made in the application for disability benefits and the nature and extent of the medical evidence in the record."); *Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582, 587 (D.C. Cir. 1997) (Claimant's statements in support of disability claims are relevant in ADA suits.). Accordingly, many Circuits have held that prior inconsistent representations defeat an ADA claim. *See, e.g., Dush v. Appleton Electric Co.*, 124 F.3d 957, 963 (8th Cir. 1997) ("The burden faced by ADA claimants in this position is, by their own making, particularly cumbersome, for summary judgment should issue unless there is 'strong countervailing evidence that the employee . . . is, in fact, qualified.' ") (quoting, *Mohamed v. Marriott International, Inc.*, 944 F. Supp. 277, 281-84 (S.D.N.Y. 1996)). With or without "judicial estoppel," or other labels, the Circuits have adopted the same approach of close factual analysis, leading to results which, if different, are explained by distinctions of fact. *Compare August v. Offices Unlimited, Inc.*, 981 F.2d 576, 579-81 (1st Cir. 1992) (Without specifically using

judicial estoppel, summary judgment upheld because claimant stated that he was disabled and unable to work beginning before he requested accommodation.); *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 74 (2nd Cir.) (Judicial estoppel used to uphold summary judgment because claimant said he was disabled at the time he was terminated.), *with D'Aprile v. Fleet Services Corp.*, 92 F.3d 1, 4-5 (1st Cir. 1996) (Summary judgment not appropriate because representations were not inconsistent with ADA claim and claimant did not represent that she was disabled prior to the adverse employment decision.). *See also, McNemar v. The Disney Store*, 91 F.3d 610, 619 (3rd Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997) (Judicial estoppel applied to uphold summary judgment when a claimant represented, under penalty of perjury, that he was disabled and unable to work and his disability began before any adverse employment decision.); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1480-82 n.3 (9th Cir. 1996) (Summary judgment proper without specifically utilizing judicial estoppel because Kennedy and her doctor had represented that she was totally disabled. Thus, "there was no genuine issue that she could have performed her job with the proposed, or any other, reasonable accommodation.").

Many courts have compared the statutory language in the ADA with the Social Security Act. *See, e.g., Weigel v. Target Stores*, 122 F.3d 461, 465-66 (7th Cir. 1997). To prevail under the ADA, the claimant must prove that he is a "qualified individual with a disability." 42 U.S.C. § 12112(a) (1995). To be a qualified individual with a disability, the claimant must prove that he can perform

the essential functions of his job with or without reasonable accommodation. *Id.* at § 12111(8).[12] Under the Social Security Act, an individual may receive benefits if he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" that is expected to last for a continuous period of twelve months or will result in death. 42 U.S.C. § 423(d)(1)(A) (Supp. 1997). Further, the impairment must prohibit the recipient from performing his previous work or engaging in any other kind of substantial gainful work which exists in the national economy. 42 U.S.C. § 423(d)(2)(A) (Supp. 1997). The assertion by a claimant that he is simultaneously "capable of performing the essential functions of his job" yet incapable of "working in the national economy" is logically inconsistent. *See Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513, 518 (5th Cir. 1997); *McNemar v. The Disney Store*, 91 F.3d 610, 618 (3rd Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997). Nevertheless, because the Social Security Act does not consider reasonable accommodation, and the ADA does, most courts have concluded that whether a Social Security disability recipient can establish a prima facie case under the ADA depends upon the content and context of the assertions. *See Dush v. Appleton Electric Co.*, 124 F.3d 957, 961, 963 (8th Cir. 1997) (Summary judgment proper because claimant told workers' compensation court that she was totally disabled and unemployable as of the date

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[12] The ADA does not protect those who cannot do their jobs. *See McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 618 (3rd Cir. 1996), *cert denied*, 117 S. Ct. 958 (1997) ("A person unable to work is not intended to be, and is not, covered by the ADA.")

of her discharge.); *Weigel v. Target Stores*, 122 F.3d 461, 463, 468 (7th Cir. 1997) (Claimant's representation that she was "wholly unable to work" and her doctor's assertions that she was "totally disabled" were sufficient to uphold summary judgment.)

The Circuits have unanimously declined to adopt a per se bar.[13] Thus, a claimant's application for and receipt of Social Security disability benefits does not automatically disqualify him from ADA protection. Because of the distinctions between the ADA and the Social Security Act, the Circuits focus on the representations the claimant and his witnesses made to enable him to receive Social Security or other disability benefits. *See Talavera v. School Board of Palm Beach County*, 129 F.3d 1214, 1220 (11th Cir. 1997) ("[A]n ADA plaintiff should not be permitted to disavow any statements she made in order to obtain SSD benefits.") Often, the claimant's representations are so

[13] Many courts assumed that the Third Circuit adopted a per se bar in *McNemar v. The Disney Store*, 91 F.3d 610, 619 (3rd Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997). *See, e.g., Dush v. Appleton Electric Co.*, 124 F.3d 957, 961 (8th Cir. 1997) (stating that the Third Circuit in *McNemar* affirmed the District Court's application of judicial estoppel as a per se bar). However, in *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503 n. 5 (3rd Cir. 1997), the Third Circuit stated that *McNemar* was a fact specific holding and an individual's claim is not always barred because of prior representations or determinations of disability. *See also Talavera v. School Board of Palm Beach County*, 129 F.3d 1214, 1218 (11th Cir. 1997) ("Taking into consideration the *Krouse* Court's discussion of *McNemar*, it appears that no Court of Appeals has adopted the position that a plaintiff who has claimed total disability on a benefits application is per se estopped from claiming that he could work with reasonable accommodations under the ADA.")

strong that a prima facie case cannot be established under the ADA. *See McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 619 (3rd Cir. 1996), *cert denied*, 117 S. Ct. 958 (1997) (Claimant stated that he was "unable to work."); *Dush v. Appleton Electric Co.*, 124 F.3d 957, 964-65 (8th Cir. 1997) (Claimant said she was "totally disabled" and "unemployable."); *Budd v. ADT Security Systems, Inc.*, 103 F.3d 699, 700 (8th Cir. 1996) (Plaintiff made representations about his physical inabilities which were completely at odds with an ability to perform the essential functions of his job.); *Weigel v. Target Stores*, 122 F.3d 461, 463, 469 (7th Cir. 1997) (Claimant represented she was "wholly unable to work."); *Weiler v. Household Finance Corp.*, 101 F.3d 519, 525 (7th Cir. 1996) (Weiler stated that she was "no longer able to work at HFC in any capacity."); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1482 (9th Cir. 1996) (Claimant represented he was completely disabled for all work related purposes.); *August v. Offices Unlimited, Inc.*, 981 F.2d 576, 584 (1st Cir. 1992) (Plaintiff stated he was "totally and continuously disabled."). *See also Simon v. Safelite Glass Corp.*, 128 F.3d 68, 74 (2nd Cir. 1997). In short, the overwhelming majority of the circuit courts have upheld summary judgment in favor of an employer not because of the rote application of judicial estoppel, but because the claimant cannot factually overcome representations made when seeking disability benefits. *Id.*

If a claimant's representations are inconsistent, many courts apply judicial estoppel. *See McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 619 (3rd Cir. 1996), *cert denied*, 117 S. Ct. 958; *Taylor v. Food World, Inc.*, No. 97-6017, 1998 WL

29638 (11th Cir. 1998); *Simon v. Safelite Glass Corp.*, 128 F.3d 68 (2nd Cir. 1997). Judicial estoppel protects the integrity of the court system because it prohibits parties from changing their representations to fit their audience. *See, e.g., McNemar,* 91 F.3d at 620 (Claimant not entitled to make false representations with impunity.); *Reigel v. Kaiser Foundation Health Plan of North Carolina,* 859 F. Supp. 963, 967-70 (E.D.N.C. 1994) (Claimant "cannot speak out of both sides of her mouth with equal vigor and credibility before the court."); *Fleck v. K.D.I. Sylvan Pools, Inc.*, 981 F.2d 107, 121 (3rd Cir. 1992), *cert. denied,* 507 U.S. 1005 (1993) (It goes without saying that one cannot casually cast aside representations, oral or written, in the course of litigation simply because it is convenient to do so.)

Other courts have been reluctant to apply judicial estoppel because they fear that doing so will create a per se rule which always bars an ADA claim following receipt of Social Security benefits. *See Griffith v. Wal-Mart Stores, Inc.*, No. 96-6361, 1988 WL 29870 (6th Cir. 1998); *Blanton v. Inco Alloys International Inc.*, 123 F.3d 916 (6th Cir. 1997) (Court implies that judicial estoppel creates a per se bar). That concern is misplaced. Judicial estoppel, when applied correctly, bars a claim only when a claimant's representations are inconsistent. *See Simon v. Safelite Glass Corp.*, 128 F.3d 68, 73 (2nd Cir. 1997) ("If the statements can be reconciled there is no occasion to apply an estoppel."); *Taylor v. Food World, Inc.*, No. 97-6017, 1998 WL 29638 (11th Cir. 1998) (Judicial estoppel did not bar ADA claim because assertions were not inconsistent). Therefore, before applying judicial estoppel, a court must first determine whether a claimant's representations are inconsistent. *Id.* If the assertions in the particular case are

not inconsistent, they will not bar an ADA claim. *Id.; see also McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 617 (3rd Cir. 1996), *cert. denied,* 117 S. Ct. 958 (1997) (Judicial estoppel is applied "with a recognition that each case must be decided upon its own particular facts and circumstances.")

Regardless of whether judicial estoppel was applied, the courts have consistently examined the facts of each case to determine whether the ADA claimant could establish a prima facie case. *Compare August v. Offices Unlimited, Inc.*, 981 F.2d 576, 584 (1st Cir. 1992) (Summary judgment upheld because representations of total disability precluded claimant from establishing he could perform the essential functions of his job.), *with D'Aprile v. Fleet Services Corp.*, 92 F.3d 1, 5 (1st Cir. 1996) (Summary judgment improper because representations not inconsistent.). *See also Dush v. Appleton Electric Co.*, 124 F.3d 957, 963 (8th Cir. 1997) (Without utilizing the doctrine of judicial estoppel, the court stated that an ADA claimant's prior representations of total disability normally carry sufficient weight to uphold summary judgment against the ADA claimant.) Because the Circuits agree that an individual factual evaluation is essential, a decision by this Court will not lessen the burden on lower courts. The decisions of lower courts show the proper analysis for cases such as this is understood – each case must be examined and the individual assertions reviewed in context.

II. The Fifth Circuit's Holding is Reasonable and Appropriate.

The Fifth Circuit recognized the inconsistency of a claimant asserting complete disability and a resulting inability to work while, at the same time, alleging she had the ability to perform the essential functions of a job with a reasonable accommodation. *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 516, 516. *See also McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 618 (3rd Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997) ("McNemar's statements on his disability benefits application are 'unconditional assertions as to his disability;' he should not now be permitted to 'qualify those statements where the application itself is unequivocal.' "); *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503 (3rd Cir. 1997) ("*McNemar* remains the law in this Circuit.") As the Second Circuit stated, the words "unable to work" are not words of art susceptible of being misunderstood. *See Simon v. Safelite Glass Corp.*, 128 F.3d 68, 74 (2nd Cir. 1997).[14]

The Fifth Circuit also examined the differences between the ADA and the Social Security Act. The court noted that the SSA considers some conditions to be presumptively disabling. *Cleveland*, 120 F.3d at 517. Further, the SSA does not consider whether the individual can work with reasonable accommodation.[15] *Id.* at 517-18. The

[14] The Second Circuit did not address whether judicial estoppel would preclude a claim under the ADA. *Simon*, 128 F.3d at 74.

[15] Although Cleveland contends that PMSC had a duty to reasonably accommodate her, "the duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position." *Myers v. Hose*, 50 F.3d 278, 284 (4th Cir. 1995). *See also* 42 U.S.C. § 12111(9)(B) (1995); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). No reasonable accommodation is required – or even possible – when Cleveland was admittedly disabled and unable to do her job.

court also observed that the SSA has a trial work program which recognizes that some individuals may qualify for Social Security disability benefits while they are able to work. *Id.* at 517. Sensitive to the fact that a claimant could be both disabled under the Social Security Act and capable of performing the essential functions of his job, the Fifth Circuit rejected a per se rule which would automatically prohibit Social Security recipients from establishing an ADA claim. *Id.* at 517. In order to preserve judicial integrity and the integrity of the Social Security program, both of which depend on truthful participation, the Fifth Circuit adopted a reasonable, common sense standard that allows a claimant to pursue both Social Security disability benefits and ADA protection in an appropriate case. The Fifth Circuit's approach does not automatically bar ADA claims after application and receipt of Social Security disability benefits. *Cleveland*, 120 F.3d at 518. The application and receipt of benefits, however, creates a rebuttable presumption that a claimant, such as Cleveland, is not a qualified individual with a disability. *Id.* at 518. If the claimant comes forward with evidence that he is both capable of performing the essential functions of his job and disabled, the receipt of disability benefits will

not preclude his ADA claim. *Id.* This approach harmonizes the legislative intent of both the ADA and the SSA.

In the present case, Cleveland repeatedly and unambiguously represented to the SSA that she became "unable to work on January 7, 1994," and that she is "disabled." (R.II 394-397). She represented "I had a stroke in January 1994, I went back to work but I couldn't work" and "I could no longer do my job because of my disability." (R.II 417, 421). Her medical providers stated that she is "100% disabled" and "permanently and completely disabled from any productive work." (R.II 75, 314). Cleveland's assertions were deliberate. For example, she told the Texas Rehabilitation Commission that she was there "[t]o get my disability." (R.II 421). When asked why she had applied for disability benefits, she responded "I had a stroke in January 1994. I went back to work but I couldn't work." (R.II 421). Moreover, Cleveland made consistent, unambiguous representations under penalty of perjury that she was disabled and unable to work beginning January 7, 1994. (R.II 394-434); *Cleveland*, 120 F.3d at 518. Cleveland never told the SSA that her disability began, or grew worse, after her termination from PMSC. (R.II 56-386). As a result, an administrative law judge found that Cleveland became disabled beginning January 7, 1994 and awarded Social Security disability benefits retroactive to that date. (R.II 434); *Id.* at 515. Therefore, based upon Cleveland's unambiguous, consistent representations of disability which were made under penalty of perjury, the Fifth Circuit appropriately held that her assertions created a rebuttable presumption, one she did not rebut, that she could not simultaneously perform the essential functions of her job. *Id.* at 517.

Cleveland's uncorroborated and self-serving summary judgment evidence was insufficient to overcome her own previously, uncontradicted sworn statements. *Id.* at 518-19.

In criticizing the Fifth Circuit, Cleveland heavily relies on *Swanks v. Washington Metropolitan Transit Authority*, 116 F.3d 582 (D.C. Cir. 1997). *See* Petition pp. 14-20. The *Swanks* court acknowledged that the statements supporting disability claims are relevant in ADA suits. *Swanks*, 116 F.3d at 587. The D.C. Circuit, however, did not review Swanks assertions:

> . . . [t]he record contains no evidence of Swanks's position before the Social Security Administration; we know nothing about what he said in his application for Social Security disability benefits, what evidence he provided to support his claim, or what statements he or any of his witnesses made in the course of the proceedings.

Id. at 587. In short, since the *Swanks* court did not have enough facts to presume the existence of inconsistent statements, it could not reasonably and responsibly grant summary judgment.

Further, *Swanks* cited, with approval, *Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1123 (D.C. Cir. 1991), "holding that parties' prior sworn statements must be given 'controlling weight' at summary judgment unless 'the shifting party can offer persuasive reasons for

believing the supposed correction.' "[16] Thus, under the D.C. Circuit's analysis, Cleveland's sworn representations would be given "controlling weight" and she would have been required to offer persuasive reasons for believing the supposed correction. *Id.* at 1123. The Fifth Circuit properly found that Petitioner's previously uncontradicted sworn representations were not overcome by her "supposed correction." *Cleveland,* 120 F.3d at 518. Because the *Swanks* court was unable to analyze the representations Swanks made to the SSA, it is pure speculation for Petitioner to assume what the D.C. Circuit would hold if presented with the representations made in the present case. The D.C. Circuit, like other Circuits, rejected a per se bar in favor of an individual review of the claimant's sworn assertions within the factual context of each case to determine whether she has produced sufficient evidence to overcome summary judgment. *Swanks,* 116 F.3d at 587.

The Fifth Circuit's holding is essentially the same reasonable approach adopted by the Seventh and Eighth Circuits. *Compare Cleveland,* 120 F.3d at 518 *with Weigel v. Target Stores,* 122 F.3d 461 (7th Cir. 1996)[17] *and Dush v.*

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[16] In *Pyramid Securities Ltd.,* the court also noted that "the objectives of summary judgment would be seriously impaired if the district court were not free to disregard the later testimony." *Id.* [Citations omitted]

[17] Cleveland asserts that *Weigel* supports her position. Petition at p. 18. The *Weigel* court upheld summary judgment for the employer on facts which are virtually identical to the facts of the present case. In *Weigel,* the claimant represented that she was unable to work and her doctor said that she was "totally disabled" from her job or "any other work." *Weigel,* 122 F.3d at

Appleton Electric Co., 124 F.3d 957 (8th Cir. 1997). All three Circuits have declined to adopt a per se bar and appropriately place great significance on the claimants' sworn representations. *See Cleveland,* 120 F.3d at 517. In *Weigel,* the court stated,

> [t]he point here is a simple one: when employees (and/or their physicians) represent that they are 'totally disabled,' 'wholly unable to work,' or some other variant to the same effect, employers and factfinders are entitled to take them at their word; and, such representations are relevant evidence of the extent of a plaintiff's disability, upon which an employer may rely in attempting to establish that an ADA plaintiff is not a 'qualified individual with a disability.'

Weigel, 122 F.3d at 467-68. Similarly, in *Dush,* the Eighth Circuit stated, "[w]here, as here, the party opposing the motion has made sworn statements attesting to her total disability and has actually received payments as a result of her condition, the courts should carefully scrutinize the evidence she marshals in an attempt to show she is covered by the ADA." *Dush,* 124 F.3d at 963.

As in the Fifth Circuit, claimants in the Seventh and Eighth Circuits must produce evidence to overcome their

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463. The court concluded that Weigel's position that she could have worked and her doctor's affidavit that "there was a good chance Shirley Weigel could have returned to her position at Target. . . . " were insufficient to overcome summary judgment. *Id.* at 468-69. Likewise, Cleveland's claim that she could have worked and Dr. Herzog's contention that he expected a full recovery, cannot overcome the consistent and unambiguous sworn representations of Cleveland's inability to work.

previous inconsistent representations. *Cleveland*, 120 F.3d at 517; *Weigel*, 122 F.3d at 468; *Dush*, 124 F.3d at 964. The *Weigel* court noted that a claimant is free to come forward with additional evidence that shows she could perform the essential duties of the desired position. *Weigel*, 122 F.3d at 468; *see Dush*, 124 F.3d at 964 ("Dush has not come forth with 'strong countervailing evidence that she was, in fact, qualified.' ") (quoting *Mohamed v. Marriott International, Inc.*, 944 F. Supp. 277, 282 (S.D.N.Y. 1996)). Likewise, in the Fifth Circuit, a claimant can come forward with evidence to rebut the presumption that he is unable to perform the essential functions of his job. *Cleveland*, 120 F.3d at 517. Petitioner failed to do so. *Id.* at 518. Therefore, summary judgment was appropriate.

The Fifth, Seventh and Eighth Circuits agree that, as a general rule, summary judgment against the ADA claimant can be appropriate. *Cleveland*, 120 F.3d at 518-19; *Weigel*, 122 F.3d at 468 ("As a general matter . . . absent some such affirmative showing of the plaintiff's ability to perform the essential functions of the position, there will be no genuine issue of material fact as to whether the plaintiff is a 'qualified individual' and the employer will be entitled to judgment as a matter of law."); *Dush*, 124 F.3d at 963 ("Typically, the prior representations of total disability carry sufficient weight to grant summary judgment against the plaintiff.") (quoting *Mohamed v. Marriott International, Inc.*, 944 F. Supp. 277, 281-84 (S.D.N.Y. 1996)). Accordingly, the Seventh and Eighth Circuits sustained summary judgment in favor of the employer on facts similar to those in the present case. *Weigel*, 122 F.3d at 468; *Dush*, 124 F.3d at 964.

By factually analyzing each case, the Circuits are merely requiring a claimant to be honest. If the claimant is disabled and cannot work, he may be entitled to Social Security disability benefits. If he can work, then the ADA prohibits employment discrimination. The Circuits recognize that a claimant may, in certain circumstances, be entitled to Social Security disability benefits and be a qualified individual with a disability. A claimant should not, however, be allowed to make whatever representations are necessary to obtain Social Security disability benefits and then receive money from his former employer when he was admittedly so disabled that he could not work. Congress limited the ADA to those who can perform the essential functions of their job. *See* 42 U.S.C. § 12111(8) (1995). "To rule otherwise might leave the implication that someone who feels himself in need of further income is free to misrepresent important information to the Social Security Administration." *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 72 (2nd Cir. 1997).

Here, Cleveland engages in hyperbole by suggesting that the opinion in this case, and other similar opinions, will nullify the ADA and exclude from its protections for all time all who have ever sought Social Security disability benefits. Petition pp. 9-13. That is not the case. In fact, the Fifth Circuit chose an analytical framework which avoids any "per se" rule which might have the effect on the ADA that Cleveland fears. The application for Social Security disability benefits only gives rise to a rebuttable presumption that judicial estoppel should apply. Therefore, it is the nature of the representations made in the application, together with other evidence a claimant may muster, which determines whether the presumption has

effect or is rebutted. *See Cleveland*, 120 F.3d at 517. Where, as here, the claim for benefits is based upon clear, consistent and unequivocal representations of disability, and no credible admissible evidence contradicts those representations, the presumption of judicial estoppel arising from the inconsistent claims applies and the later claim based upon an alleged ability to perform the essential functions of the claimant's job fails. *See id.*

That is not to say the presumption of judicial estoppel can never be rebutted. For example, if the Fifth Circuit were deciding the facts in *Taylor v. Food World, Inc.*, No. 97-6017, 1998 WL 29638 (11th Cir. 1998), where the claimant's mother told the SSA that the claimant needed "supervision, structure, and routine" but never stated that he could not perform his job, the presumption would likely be rebutted. *See Cleveland*, 120 F.3d at 517. Similarly, if the claimant has a condition which automatically qualifies him for benefits, such as a brain tumor,[18] but he never represents that he is completely disabled or unable to work, the presumption is likely rebutted. *Whitbeck v. Vital Signs, Inc.*, 116 F.3d 588, 591-92 (D.C. Cir. 1997) (Court overturned summary judgment in part because claimant had a listed impairment which automatically entitled her to Social Security disability benefits.). As the Fifth Circuit recognizes, the disability supporting the Social Security claim may be such that the claimant is nonetheless able to perform the essential functions of his job. Accordingly, the Fifth Circuit's holding insures that a

[18] *See* 20 C.F.R. § 404, Subpt. P, App. 1 (1997); 20 C.F.R. § 404.1525 (1997).

claimant honestly represents the nature of his condition to the SSA without foreclosing ADA protection.

CONCLUSION

The Circuit Courts which have considered the issue unanimously agree that representations a claimant makes when applying for and receiving disability benefits are relevant in deciding whether he can establish a prima facie case under the ADA. The courts consider the content of the claimant's representations in the factual context of each case. If the claimant's representations are inconsistent with his position that he can perform the essential functions of his job, some courts use judicial estoppel to guard against judicial inconsistencies, while others reach the same conclusion without specifically invoking the doctrine. Regardless of labels, each court, like the Fifth Circuit, considers whether the claimant can overcome his previous representations. In the present case, the Fifth Circuit has adopted a reasonable approach holding that a claimant's application or receipt of Social Security disability benefits creates a rebuttable presumption that he cannot perform the essential functions of his job. A claimant can overcome the presumption; therefore, receipt of Social Security disability benefits is not an absolute bar to ADA protection. This approach protects the integrity of the courts and the Social Security application process, furthers the goals of both statutes, and establishes an orderly and reasonable method for

resolving seemingly inconsistent claims. Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

CAROLYN C. CLEVELAND, PETITIONER

v.

POLICY MANAGEMENT SYSTEMS CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the application for or receipt of disability insurance benefits under the Social Security Act, 42 U.S.C. 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that he is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1008

CAROLYN C. CLEVELAND, PETITIONER

v.

POLICY MANAGEMENT SYSTEMS CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

This case concerns the appropriate impact of an employee's application for or receipt of disability insurance benefits under the Social Security Act, 42 U.S.C. 423, on the employee's suit against her employer alleging that the employer discharged her in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*

1. a. The ADA prohibits an employer from discriminating against a "qualified individual with a disability" because of the disability. 42 U.S.C. 12112(a). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions" of his job. 42 U.S.C. 12111(8).

The determination whether a person with a disability is "qualified" "requires an individualized, case-by-case assessment of the specific abilities of the person, the specific requirements of the position that the person holds or desires, and the manner in which the person may be able or enabled to meet those requirements." *EEOC: Benefits Applications and ADA Claims* (issued Feb. 12, 1997) *reprinted in* BNA's *Americans with Disabilities Act Manual* (*EEOC Guidance*), No. 62, at 70:1251, 70:1255. The "definition of the term 'qualified individual with a disability' expressly requires consideration of whether the individual can perform [the] essential functions [of his job] with reasonable accommodation." *Ibid.* Reasonable accommodations may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations." 42 U.S.C. 12111(9)(B).

b. Under the Social Security Act, 42 U.S.C. 423, as interpreted by the Social Security Administration (SSA), an individual can have a "disability" that entitles him to benefits even if he could have performed his previous job if his employer had provided him with reasonable accommodations. The Act provides that an insured individual has a "disability" and is entitled to benefits if he is unable to engage in "substantial gainful activity" because of a "physical or mental impairment" that is expected to result in death or that has lasted or can be expected to last for 12 months or more. 42 U.S.C. 423(a)(1)(D), 423(d)(1)(A). The impairment must be "of such severity that he is not

only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A).

The SSA applies a five-step process to determine whether an adult claimant qualifies for benefits. See *Bowen* v. *Yuckert*, 482 U.S. 137, 140-142 (1987). First, the claimant must not be engaged in "substantial gainful activity." 20 C.F.R. 404.1520(b). Second, the claimant must have a medical impairment that is severe enough to limit significantly his ability to do basic work activities. *Id.* at 404.1520(c), 404.1521. Third, if the impairment is equivalent to one of the impairments listed by the Secretary at 20 C.F.R. Part 404, Subpart P, Appendix 1, benefits are awarded without further inquiry into the claimant's ability to perform his prior job or any other work. *Id.* at 404.1520(d), 404.1525, 404.1526; see also *Yuckert*, 482 U.S. at 153; *Heckler* v. *Campbell*, 461 U.S. 458, 460 (1983).

Fourth, if the claimant's impairment is not equivalent to one on the list, the claimant must be unable to perform his "past relevant work," see 20 C.F.R. 404.1520(e) and (f), and, fifth, he must be unable to perform any other work in the national economy, see 404.1560(c). "The fact that an individual may be able to return to a past relevant job, provided that the employer makes accommodations, [is] not relevant" to that inquiry. See Daniel L. Skoler, Assoc. Comm'r, SSA, Disabilities Act Info. Mem. (June 2, 1993), *reprinted in* 2 *Social Security Practice Guide*, App. § 15C[9] (*SSA Guidance*), at App. 15-401 (MB 1997), cited in U.S. Amicus Br. at 8, in *Swanks* v. *WMATA*,

No. 96-7078 (D.C. Cir.) (*Swanks* Brief), *reprinted at* Pet. App. 43a-44a.

SSA regulations state that, if a person "believe[s]" he "may be entitled to benefits," he "should file an application," 20 C.F.R. 404.603, on forms prescribed by the SSA. *Id.* at 404.610(a), 404.611(a). The forms, often generated by SSA's computerized application system, contain standard language asserting that the applicant is "unable to work" and "disabled." See, *e.g.*, *McNemar* v. *The Disney Store, Inc.*, 91 F.3d 610, 615 nn. 2 & 3 (3d Cir. 1996), cert. denied, 117 S. Ct. 958 (1997); *Mohamed* v. *Marriott, Int'l, Inc.*, 944 F. Supp. 277, 279 (S.D.N.Y. 1996); *Griffith* v. *Wal-Mart Stores, Inc.*, 930 F. Supp. 1167, 1168-1169 (E.D. Ky. 1996), rev'd on other grounds, 135 F.3d 376 (6th Cir. 1998), petition for cert. pending, No. 97-1991. The forms do not suggest that a claimant may qualify the statements attesting to his disability and inability to work by noting that he would be able to work if he were provided reasonable accommodation. See *Griffith*, 135 F.3d at 382.

2. Petitioner Carolyn Cleveland began working for respondent Policy Management Systems Corporation in August 1993. Pet. App. 2a. Petitioner suffered a stroke in January 1994 and took a leave of absence from work. *Ibid.* On January 26, 1994, she signed an application for Social Security disability benefits prepared by her daughter in which she certified, using the standard language on forms generated by SSA's computerized applicat' n system, that she was "'unable to work because of [her] disabling condition on January 7, 1994' and that she was 'still disabled.'" *Ibid.* (quoting application).

In April 1994, petitioner's physician released her to return to work. Pet. App. 2a. Petitioner resumed her

job with respondent, notifying the SSA of the change in her condition. *Id.* at 2a-3a. Petitioner encountered difficulties performing her job on her return to work and asked for several accommodations to assist her. *Id.* at 3a. Respondent denied all of petitioner's requested accommodations and, in July 1994, terminated her employment. *Ibid.*

On September 14, petitioner renewed her application for disability benefits by filing a "Request for Reconsideration." Pet. App. 3a. Again using the standard language contained on forms generated by the SSA, petitioner represented that she "continue[d] to be disabled," *ibid.* (quoting Request for Reconsideration Sept. 14, 1994). Petitioner also stated that her employer terminated her because she "could no longer do the job because of [her] condition." *Ibid.* (quoting Work Activity Report submitted in conjunction with the Request for Reconsideration). Petitioner filed a second "Request for Reconsideration" in January 1995, reaffirming that she was "unable to work," *ibid.*, again using the standard language in SSA forms.

Petitioner made no statement about her ability to perform her prior job with reasonable accommodations in any of her submissions to the SSA, and she was not asked to make such a statement. The matter was subsequently referred to an administrative law judge (ALJ), who, in September 1995, awarded petitioner disability benefits effective retroactively to January 7, 1994. *Ibid.*

3. a. One week before the ALJ's decision, petitioner brought this suit under the ADA. Pet. App. 3a-4a. She claimed that respondent terminated her employment because of her disability. Complaint ¶ 7. Peti-

tioner further alleged that respondent unlawfully failed to accommodate her disability. *Ibid.*

Respondent moved for summary judgment, arguing that petitioner "could not establish a prima facie case under the ADA, as her representations in her application for, and her receipt of, social security disability benefits estopped her from claiming that she is a 'qualified individual with a disability.'" Pet. App. 4a.[1] In response to the motion, petitioner submitted an affidavit detailing various accommodations that she had requested and alleging that all of the accommodations were denied. See Affidavit of Carolyn C. Cleveland 3. Petitioner's affidavit also alleged that her condition worsened as a consequence of her firing. *Ibid.* Petitioner also submitted an affidavit from her physician stating, "[p]rior to [petitioner's] termination, I had anticipated that [she] would ultimately reach a near 100% recovery" but, following her termination, "she became depressed and her aphasia became worse." Affidavit of Steven P. Herzog, M.D. 2. Petitioner's physician opined that "had [petitioner] been given training time and assistance on the job, instead of being terminated, she would have continued to recover from the stroke." *Ibid.* The district court granted summary judgment for respondent. Pet. App. 4a.

b. On appeal, the Fifth Circuit affirmed the district court's grant of summary judgment. Pet. App.

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[1] "Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." Pet. App. 8a. The doctrine seeks "to protect the integrity of the judicial process" by preventing a party from "speak[ing] out of both sides of her mouth with equal vigor and credibility." *Id.* at 8a & n.10 (internal quotation marks omitted).

1a-13a. The court first rejected "a per se rule that automatically estops an applicant for or recipient of social security disability benefits from asserting a claim of discrimination under the ADA." *Id.* at 8a. The court recognized that, because of the different legal standards involved, claims under the Social Security Act and the ADA "would not necessarily be mutually exclusive." *Id.* at 9a. The court nonetheless adopted a standard that calls for the application of estoppel in the vast majority of cases in which an individual applies for or receives Social Security disability benefits.

Specifically, the court ruled that "the application for or the receipt of social security disability benefits creates a *rebuttable* presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.'" Pet. App. 11a. The court opined that an individual would be able to overcome that presumption, if at all, only "under some limited and highly unusual set of circumstances." *Id.* at 9a. Applying that standard, the court ruled that petitioner had not "raised a genuine issue of material fact to rebut the presumption that, while she remains disabled for purposes of Social Security, she is estopped from asserting that she is a 'qualified individual with a disability.'" *Id.* at 12a.

Petitioner sought rehearing. The Equal Employment Opportunity Commission (EEOC) filed a brief as *amicus curiae* in support of petitioner. Pet. App. 18a-35a. The panel denied the petition for rehearing without explanation. *Id.* at 16a.

DISCUSSION

The Court should grant the petition for certiorari. The courts of appeals are in considerable disarray

over the impact that an employee's application for or receipt of Social Security disability benefits should have on the employee's claim under the ADA. Moreover, the rule stated by the Fifth Circuit in this case has been adopted by no other circuit, is inconsistent with the position of the EEOC and the SSA, the agencies which administer the two statutes at issue, and is incorrect. For those reasons, and because the issue is important to the effective enforcement of the ADA, review by this Court is warranted.

1. The Fifth Circuit's decision is inconsistent with the views of every other court of appeals that has addressed the question presented by this case. No other court of appeals has held that an employee's application for or receipt of Social Security disability benefits creates a presumption that the employee is judicially estopped from asserting that she is a "qualified individual with a disability" under the ADA. No other court of appeals has limited a Social Security applicant's ability to establish her qualification to raise an ADA claim to a "limited and highly unusual set of circumstances." Pet. App. 9a.

a. The courts of appeals have divided several ways over the proper legal effect to accord application for or receipt of Social Security disability benefits in a subsequent ADA action. The largest group has rejected estoppel and held that statements made in support of a benefit claim should be analyzed "under traditional summary judgment principles" as relevant evidence bearing on the qualification issue. See *Griffith*, 135 F.3d at 383; accord *Rascon* v. *U.S. West Communications, Inc.*, No. 96-2194, 1998 WL 223465, at **6-10 (10th Cir. May 6, 1998); *McCreary* v. *Libbey-Owens-Ford Co.*, 132 F.3d 1159, 1164-1165 (7th Cir. 1997); *Swanks* v. *WMATA*, 116 F.3d 582, 584-587 (D.C. Cir. 1997).

One circuit, although rejecting estoppel, has imposed a heightened burden of proof on ADA plaintiffs who previously claimed Social Security disability benefits. See *Moore* v. *Payless Shoe Source, Inc.*, 139 F.3d 1210, 1213 (8th Cir. 1998) (plaintiff must produce "strong countervailing evidence" to overcome prior sworn statements of disability).[2]

Still other courts of appeals have ruled that estoppel may be appropriate in certain circumstances but that, in most cases, an application for Social Security disability benefits and an ADA claim will be reconcilable. See *Johnson* v. *Oregon*, 141 F.3d 1361, 1366-1370 (9th Cir. 1998); *Talavera* v. *School Bd.*, 129 F.3d 1214, 1217-1220 (11th Cir. 1997); *Krouse* v. *American Sterilizer Co.*, 126 F.3d 494, 501-503 & nn.3-5 (3d Cir.

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[2] The Eighth Circuit's views are somewhat unclear. The *Moore* panel cited *Dush* v. *Appleton Electric Co.*, 124 F.3d 957, 963 (8th Cir. 1997), in support of a heightened evidentiary standard. Although *Dush* indeed imposed a "particularly cumbersome" "burden," *ibid.*, the opinion reserved "the question of whether and to what extent judicial estoppel, or some other form of estoppel, will operate to prohibit someone who has formerly claimed to be 'totally disabled' from making out a prima facie ADA case." *Id.* at 962 n.8. The *Dush* panel noted that prior opinions of the Eighth Circuit conflicted on the applicability of estoppel. See *ibid.* (citing *Robinson* v. *Neodata Servs., Inc.*, 94 F.3d 499, 501-502 (1996) (rejecting estoppel); *Eback* v. *Chater*, 94 F.3d 410, 412 (1996) (noting lack of direct relationship between ADA and Social Security standards); and *Budd* v. *ADT Sec. Sys., Inc.*, 103 F.3d 699 (1996) (per curiam) (affirming application of estoppel)). The panel concluded that "the issue, at least for the time being, remains open in our Circuit." *Dush*, 124 F.3d at 962 n.8.

1997).[3] In those courts, "in most cases, * * * '[s]traightforward summary judgment analysis, rather than theories of estoppel,' will be appropriate." See *Johnson*, 141 F.3d at 1369; accord *Talavera*, 129 F.3d at 1220 (estoppel applies only to prevent disavowal of specific statements that are actually inconsistent with current claim); *Krouse*, 126 F.3d at 503 n.5 (courts should not apply estoppel without first applying two-part test of *Ryan Operations G.P.* v. *Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996), which requires that two positions be actually inconsistent and that either or both of the inconsistent positions have been taken in bad faith).

Only the Fifth Circuit has adopted a presumption that an employee is estopped from maintaining an ADA claim whenever he or she has applied for or received Social Security disability benefits. By that court's own lights, that presumption, although "theoretically" rebuttable, results in dismissal of ADA claims in most cases in which there has been an application for benefits. See Pet. App. 8a-9a; page 7, *supra*. Other courts have acknowledged that repre-

[3] In *McNemar* v. *The Disney Store, Inc.*, 91 F.3d 610 (1996), cert. denied, 117 S. Ct. 958 (1997), the Third Circuit initially seemed to adopt an almost per se estoppel rule. In *Krouse*, however, the Third Circuit explained that *McNemar* was tied to its "unique facts" and admonished district courts in the Circuit not to assume that "*McNemar* always bars an individual's ADA claims merely because prior representations or determinations of disability exist in the record." 126 F.3d at 503 n.5. Although the Third Circuit conjectured that the court, sitting en banc, might "revisit the issue of judicial estoppel in this type of case," *id.* at 503, it continues to be the position of the Third Circuit that estoppel can be applied, in at least some cases, to bar an otherwise viable claim of disability discrimination.

sentations made to support a benefits claim may be relevant to the issue of qualification in an ADA case; but none of those courts has burdened every plaintiff who has applied for benefits with a legal presumption of estoppel. Consequently, the ability of a disability applicant or beneficiary to maintain an ADA claim will be substantially affected by the circuit in which the claim is brought.

b. Contrary to respondent's assertion (Br. in Opp. 9), the disagreement among the courts of appeals is not "more form than substance." A survey of the reported cases confirms that there are practical consequences to the difference between the Fifth Circuit's rule and the standards applied by other courts of appeals. Since the Fifth Circuit issued its opinion in this case, several district courts in that Circuit have applied judicial estoppel to bar ADA claims. See, *e.g.*, *Graf* v. *Wal-Mart Stores, Inc.*, No. CIV. A. G-97-410, 1998 WL 244263, at *2 (S.D. Tex. May 12, 1998); *Lefler* v. *E-Sys., Inc.*, No. CIV. A. 3:96-CV 1007, 1998 WL 61908, at **2-4 (N.D. Tex. Feb. 6, 1998); *Bailey* v. *Teachers' Retirement Sys.*, No. CIV. A. 96-2339, 1998 WL 4484, at **3-4 (E.D. La. Jan. 6, 1998); *Robertson* v. *Neuromedical Ctr.*, 983 F. Supp. 669, 672-673 (M.D. La. 1997); *Pena* v. *Houston Lighting & Power Co.*, 978 F. Supp. 694, 698-699 (S.D. Tex. 1997); *Bazile* v. *AT & T-Bell Labs., Inc.*, No. CIV. A. 3:96-CV-2652-G, 1997 WL 600702, at *3 (N.D. Tex. Sept. 19, 1997), aff'd, 142 F.3d 1279 (5th Cir. 1998) (Table). Those courts have read the circuit court's opinion in this case as precluding ADA claims in most cases in which an individual has applied for Social Security disability benefits. See also *McConathy* v. *Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 562-563 (5th Cir. 1998) (dismissing ADA claim).

The approach of the district courts reflects the manner in which the court of appeals applied the presumption in petitioner's case. The court of appeals failed to discuss the evidence that might have rebutted the presumption that petitioner's award of disability benefits conflicted with her claim that she was qualified, at the time of her discharge, to perform the essential functions of her job with reasonable accommodation. Specifically, the court of appeals did not discuss the evidence that petitioner requested and was denied accommodations, might have recovered from the stroke had respondent made those accommodations, but instead became more disabled as a result of her discharge. Instead, the court of appeals focused exclusively on petitioner's use of standard language contained on SSA forms that asserted her disability and inability to work, without even considering what that language means in the context of the Social Security disability program. Pet. App. 12a. As a result, the Fifth Circuit's ruling effectively treats an application for Social Security disability benefits as an absolute legal bar to the assertion of an ADA claim. We have not found any decision issued in the Fifth Circuit subsequent to the opinion in this case that permits an ADA claim when the claimant previously applied for or received Social Security disability benefits.

In those circuits with a different rule, the picture is decidedly different. For example, the Sixth, Seventh, Ninth, and Eleventh Circuits have all reversed district court decisions granting summary judgment to employers in cases in which the plaintiffs applied for Social Security disability benefits and asserted that they were "unable to work." See *Griffith*, 135 F.3d at 378-384; *McCreary*, 132 F.3d at 1163-1165;

Johnson, 141 F.3d at 1370; *Taylor* v. *Food World, Inc.*, 133 F.3d 1419, 1422-1423 (11th Cir. 1998); *Talavera*, 129 F.3d at 1217-1220. The D.C. Circuit has similarly reversed a district court's grant of summary judgment based on the theory that application for or receipt of Social Security disability benefits bars an ADA claim. See *Swanks*, *supra*. Finally, the Tenth Circuit has upheld judgment for an ADA plaintiff who had stated to the SSA that he was "disabled and unable to work," as those terms are used by the SSA. See *Rascon*, 1998 WL 223465, at **5, 15. Clearly, the standard that a court applies to assess the effect on an ADA claim of statements made in support of a claim for disability benefits has a profound impact on the plaintiff's ability to maintain his ADA claim.

2. The Fifth Circuit's presumption of judicial estoppel not only conflicts with the holdings of the other courts of appeals, but it is also inconsistent with the views of the two agencies that administer the relevant statutes and is incorrect. Both the SSA and the EEOC have concluded that, although statements made in applying for Social Security disability benefits may be relevant evidence in a subsequent ADA suit, application for or receipt of benefits is not by itself inconsistent with being a "qualified individual with a disability" under the ADA. See *EEOC Guidance* at 70:1251-1252, 70:1254-1257, 70:1259-1266; *Swanks* Brief, Pet. App. 36a-50a; *SSA Guidance* App. 15-400-402; Pet. App. 18a-35a. The majority of the courts of appeals have correctly held that application for or receipt of benefits alone neither supports judgment as a matter of law for the defendant nor creates a presumption that the plaintiff is estopped from establishing that she is a "qualified individual with a disability."

a. Application for or receipt of Social Security disability benefits is often fully consistent with a valid ADA claim, because the determination whether someone is eligible for disability benefits differs in several material ways from the determination whether that person is a "qualified individual with a disability." First, an individual is "qualified" under the ADA if he can do the essential functions of his job *with reasonable accommodation*. See 42 U.S.C. 12111(8). In contrast, when the SSA, at step four of the sequential evaluation process, considers whether an individual can perform his "past relevant work," see 20 C.F.R. 404.1520(e) and (f), the SSA does not consider potential accommodations that his prior employer did not actually make. Nor does the SSA speculate whether other employers might be required by the ADA to make specific accommodations, when, at step five, the SSA determines whether the claimant could perform other work that exists in significant numbers in the national economy. See *Swanks* Brief, Pet. App. 43a-44a; Pet. App. 10a. Because many ADA cases, including this one, turn on disputes over reasonable accommodations rather than whether the plaintiffs could work without any accommodations, that difference between Social Security and ADA claims is very significant.

Second, although a person may qualify for Social Security disability benefits by the application of generalized presumptions about his inability to work, the determination whether someone is "qualified" under the ADA must be an individualized decision about his ability to perform the essential functions of a particular job. See *Overton* v. *Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992); *EEOC Guidance* at 70:1251. Because of the reliance on generalized presumptions, a finding

that a person is disabled for purposes of Social Security benefits does not mean that there is no job that he or she can actually perform. For example, at step three of the Social Security determination process, an individual with an impairment listed in the regulations is conclusively presumed to be "disabled" and "unable to work" without any inquiry into his ability to do his past work. See 20 C.F.R. 404.1520(d), 404.1525, 404.1526; *Swanks* Brief, Pet. App. 39a, 44a-45a; see also *Whitbeck* v. *Vital Signs, Inc.*, 116 F.3d 588, 591 (D.C. Cir. 1997); Pet. App. 10a.

Similarly, at step five of the determination process, the SSA can award disability benefits to an individual who is able to perform sedentary, light, or even medium work, based on generalized presumptions that his age, education or lack of transferrable skills from past employment make it unlikely that he could adjust to other work for which he is qualified. See *Heckler* v. *Campbell*, 461 U.S. at 460-462. An award of benefits at step three based on a claimant's possession of a listed impairment or an award of benefits at step five may well have little relevance to an ADA claim.

Third, the Social Security Act and SSA regulations allow disability insurance benefit recipients a trial work period of up to nine months during which their benefit entitlement and payment levels remain unchanged. See 42 U.S.C. 422(c), 423(e)(1); 20 C.F.R. 404.1592; *Overton*, 977 F.2d at 1192. Individuals can also remain entitled for a further period of time to benefits in any month in which their earnings fall below a statutory level. See 20 C.F.R. 404.1592a. Those work incentives reflect both the Social Security Act's purpose to encourage individuals with disabilities to work whenever possible, see 42 U.S.C. 422(a); *Mohamed*, 944 F. Supp. at 284, and the fact that

a person's disability status frequently changes over time, see, *e.g.*, *D'Aprile* v. *Fleet Servs. Corp.*, 92 F.3d 1, 4 (1st Cir. 1996) (receipt of disability benefits under private plan not inconsistent with state law discrimination claim because plaintiff claimed disability developed after, and as a result of, discharge). The work incentives demonstrate that Congress has recognized that persons who legitimately apply for and receive Social Security disability benefits may nonetheless be or become able to work.

b. Because a "qualified individual with a disability" will often be entitled to Social Security disability benefits, the Fifth Circuit erred in holding that an employee's application for or receipt of benefits creates a presumption that she is judicially estopped from asserting she is "qualified." Judicial estoppel is properly invoked only when a litigant seeks to advance a position that conflicts with a prior position.[4] See 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4477 (1981 & Supp. 1996); cf. *Davis* v. *Wakelee*, 156 U.S. 680, 689-691 (1895) (upholding equitable estoppel when defendant had asserted in prior litigation a contrary position on which plaintiff had relied).[5] Presumptions, in turn, are appropriate

[4] The doctrine of judicial estoppel has not been universally embraced. At least two courts of appeals have refused to recognize the doctrine, see *UMWA 1974 Pension* v. *Pittston Co.*, 984 F.2d 469, 477-478 (D.C. Cir.), cert. denied, 509 U.S. 924 (1993); *United States* v. *49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986), as have many other jurisdictions. See *Konstantinidis* v. *Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980). This Court, however, need not decide whether judicial estoppel may be applied in the federal courts in order to resolve the question presented by this case.

[5] See also, *e.g.*, *Moore*, 139 F.3d at 1212; *Simon* v. *Safelite Glass Corp.*, 128 F.3d 68, 72-73 (2d Cir. 1997); *Rissetto* v.

only when proof of a particular fact makes the existence of another fact sufficiently probable that "it is sensible and timesaving to assume the truth of [that other fact] until the adversary disproves it." 2 *McCormick on Evidence* § 343, at 454-455 (John W. Strong ed., 4th ed. 1992).

The fact that an individual has applied for or received Social Security disability benefits hardly makes it probable that the disability and ADA claims are in conflict. The two statutes serve persons with mental and physical impairments in complementary ways. Social Security disability benefits provide income replacement for a person during a period when he is prevented from working because of a disability, and the ADA provides a mechanism for that person to obtain workplace accommodations that will permit a return to work. There is simply no inherent conflict between the two claims.

3. This case warrants this Court's review because use of judicial estoppel to bar otherwise meritorious claims frustrates effective enforcement of the ADA. Congress enacted the ADA because individuals who experienced discrimination on the basis of a disability "often had no legal recourse to redress such discrimination." 42 U.S.C. 12101(a)(4). The Act seeks "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). In enacting the ADA, Congress assumed that many individuals on the disability benefit rolls could, with assistance or

Plumbers and Steamfitters Local 343, 94 F.3d 597, 600 (9th Cir. 1996); *Ryan Operations*, 81 F.3d at 361; *UMWA 1974 Pension*, 984 F.2d at 477; *Astor Chauffeured Limousine Co.* v. *Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1547-1548 (7th Cir. 1990); *49.01 Acres of Land*, 802 F.2d at 390; Pet. App. 8a.

accommodation, obtain employment. See H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 32-33 (1990). Congress envisioned the ADA's reasonable accommodation requirement as a device for alleviating the "staggering levels of unemployment and poverty" among the approximately "8.2 million people with disabilities [who] want to work but cannot find a job," the majority of whom are dependent upon "insurance payments or government benefits for support." *Ibid.* Thus, Congress envisioned that the ADA would provide a cause of action for many individuals *receiving* Social Security benefits that would enable them to overcome discrimination and to return to work.

The Fifth Circuit's estoppel rule impedes the objectives of the ADA by depriving most applicants for and recipients of Social Security disability benefits of their right to pursue claims of discrimination under the ADA. Individuals with potentially meritorious ADA claims frequently apply for disability benefits following their discharge from employment in order to support themselves. They apply for (and often properly receive) benefits because they face real-world barriers to employment, even though they could work with reasonable accommodations. They are therefore "qualified individuals with disabilities" under the ADA, who may have a right to accommodations that will enable them to return to work, as Congress envisioned. The rule adopted by the Fifth Circuit, however, improperly bars them from maintaining actions under the ADA and thus increases the likelihood that they will remain on the benefit rolls.[6]

---

[6] Some ADA defendants have argued that permitting a disability beneficiary to maintain a suit under the ADA would lead to an improper "double recovery." See *Swanks*, 116 F.3d at 587. That argument lacks merit. First, the court passing on the ADA claim may consider whether the possibility of a double recovery warrants offsetting the amount of disability benefits that the plaintiff received against any make-whole relief the court awards in the ADA suit. See *ibid.*; cf. *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 360-363 (1995) (courts should limit relief under Title VII to take into account after-acquired evidence of employee wrongdoing); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 n.14 (1974) (judicial relief under Title VII can be structured to avoid possible windfall gains when employee prevails in contract arbitration and also brings court action). Second, if an individual is reinstated to a job as a remedy for an ADA violation, the individual will lose his or her disability benefits at the end of the trial work period, see page 15, *supra*.

That result frustrates the purposes of the ADA not just in individual cases but on a broader level as well. As this Court has recognized, "the private litigant [suing under anti-discrimination statutes like the ADA] not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). The Court has therefore rejected application of equitable bar doctrines to private actions under federal statutes that serve "important public purposes." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995) (quoting *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 138 (1968)). Because the objectives of the anti-discrimination statutes are furthered "when even a single employee establishes that an employer has discriminated against him or her," courts may not "bar all relief for an earlier violation of the Act" because the employee has engaged in wrongdoing. *McKennon*, 513 U.S. at 358-360. Judicial estoppel is precisely the kind of equitable bar that this Court has criticized. See *Griffith*, 135 F.3d

at 382 (judicial estoppel undermines the "truth-seeking function of the court" by pretermitting potentially meritorious claims).

Invocation of judicial estoppel is particularly inappropriate in cases like this one, because there is no reason to believe that petitioner, or other applicants for disability benefits who later bring ADA claims, have sought to mislead or have otherwise engaged in any wrongdoing. Because receipt of disability benefits is generally fully consistent with a meritorious ADA claim, the Fifth Circuit's rule improperly bars potentially legitimate claims and poses a substantial threat to the effective enforcement of the ADA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1998

No. 97-1008

Supreme Court, U.S.
FILED
DEC 3 1998
CLERK

In The

Supreme Court of the United States

October Term, 1998

CAROLYN C. CLEVELAND,

Petitioner,

vs.

POLICY MANAGEMENT SYSTEMS CORP; GENERAL INFORMATION SERVICES, a Division of Policy Management Systems Corporation; and CYBERTEK CORP.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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Petition for Certiorari Filed December 15, 1997
Certiorari Granted October 5, 1998

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M-TOL APPEAL
CLOSED JURY

U.S. District Court
Northern District of Texas (Dallas)

CIVIL DOCKET FOR CASE #: 95-CV-2140
N.O. #96-11247

Cleveland v. Policy Mgt Sys Corp, et al.
Assigned to: Magistrate Judge John B Tolle
Demand: $0,000
Lead Docket: None
Dkt# in other court: None

Filed: 09/22/95
Jury demand: Plaintiff
Nature of Suit: 442
Jurisdiction: Federal Question

Cause: 29:0794 Job Discrimination (Handicap)

CAROLYN C CLEVELAND plaintiff	John E Wall, Jr, Attorney at Law 214/887-0173 FAX [COR LD NTC ret] Law Office of John E Wall Jr 5728 Prospect Avenue Suite 2001 Dallas, TX 75206 USA 214/887-0100
v.	
POLICY MANAGEMENT SYSTEMS CORP defendant	David N Kitner, Attorney at Law 214/651-4330 FAX [Cor LD NTC ret] Kimberly Sumner Moore, Attorney at Law

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GENERAL INFORMATION SERVICES
a Division of Policy Management Systems Corporation
defendant

David N Kitner,
Attorney at Law
(See above)
[COR LD NTC ret]
Kimberly Sumner Moore,
Attorney at Law
(See above) [COR ret]

CYBERTEK CORP
defendant

David N Kittner,
Attorney at Law
(See above)
[COR LD NTC ret]
Kimberly Sumner Moore,
Attorney at LAw
(See above) [COR ret]

9/22/95 1 COMPLAINT filed. [Filing Fee $ 120.00 Receipt # 74892 (4) (jrb)] [Entry date 09/25/95]

* * *

10/20/95 6 ANSWER to Complaint by defendant Policy Mgt Sys Corp, [defendant General Info Serv, defendant Cybertek Corp (Attorney David N Kitner, Kimberly Sumner Moore), (4) (svc)] [Entry date 10/23/95]

* * *

6/7/96 17 MOTION with memorandum in support by defendant Policy Mgt Sys Corp, defendant General Info Serv, defendant Cybertek Corp for partial summary judgment (15+) (cjb) [Entry date 06/10/96]

* * *

7/8/96 19 RESPONSE by Carolyn C Cleveland to [17-1] motion for partial summary judgment. (15+) (USC) (bjj) [Entry date 07/09/96]

7/19/96 20 MOTION by defendant Policy Mgt Sys Corp, defendant General Info Serv, defendant Cybertek Corp to amend [6-1] answer (8) (lmn) [Entry date 07/22/96]

7/23/96 21 Objections/RESPONSE by defendant Policy Mgt Sys Corp, defendant General Info Serv, defendant Cybertek Corp in opposition to pltf's evidence filed to [19-1] motion response (6) (krs) [Entry date 07/24/96]

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7/23/96 22 REPLY by defendant Policy Mgt Sys Corp, defendant General Info Serv, defendant Cybertek Corp to response to [17-1] motion for partial summary judgment (15+) USC (krs) [Entry date 07/24/96]

7/23/96 22 MOTION with memorandum in support by defendant Policy Mgt Sys Corp, defendant General Info Serv, defendant Cybertek Corp to supplement summary judgment evidence (15+) USC (krs) [Entry date 07/24/96]

8/2/96 23 RESPONSE by plaintiff Carolyn C Cleveland to [21-1] motion to strike [19-1] motion response/summary judgment evidence (3) (ldm) [Entry date 08/05/96]

8/2/96 23 Agreed MOTION by plaintiff Carolyn C Cleveland for leave to amend [19-1] motion response (3) (ldm) [Entry date 08/05/96]

8/12/96 24 AMENDED RESPONSE by plaintiff Carolyn C Cleveland to [17-1] motion for partial summary judgment (15+) (gjs)

* * *

9/6/96 32 JUDGMENT for defendant Policy Mgt Sys Corp, defendant General Info Serv, defendant Cybertek Corp against plaintiff Carolyn C Cleveland; action dismissed on the merits and defts recover of pltf their costs of action (signed by JBT) Copies to counsel: 09.10.96 Page(s): (wcc) [Entry date 09/10/96]

* * *

10/2/96 35 NOTICE OF APPEAL by plaintiff Carolyn C Cleveland from the final ordered [sic] entered on 9/6/96. Fee payment amount: 105.00 Receipt #85514 Cpy to Judge TO to Cnsl (gjs) [Entry date 10/03/96]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CAROLYN C. CLEVELAND	)	**CIVIL ACTION NO.**
V.	)	**395CV2140-H**
	)	
POLICY MANAGEMENT	)	
SYSTEMS CORPORATION,	)	
GENERAL INFORMATION	)	
SERVICES, A DIVISION OF	)	
POLICY MANAGEMENT	)	
SYSTEMS CORPORATION	)	
and CYBERTEK	)	
CORPORATION	)	

PLAINTIFF'S ORIGINAL COMPLAINT

(Filed Sep. 22, 1995)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Carolyn C. Cleveland, Plaintiff, complaining of Defendants, Policy Management Systems Corporation, General Information Services, A division of Policy Management Systems Corporation and Cybertek Corporation and would respectfully show unto the Court as follows:

1. The jurisdiction of this Court is invoked to seek a redress of violations of the Americans with Disabilities Act of 1991 and TEX. LAB. CODE. ANN. § 451.001 (Vernon Supp. 1995).

2. Plaintiff, Carolyn C. Cleveland, is a female citizen of the United States and a resident of Richardson, Dallas County, Texas. Plaintiff has been employed by Defendant at its facility in Dallas County, Texas. Plaintiff has been

subjected to unlawful employment practices committed in the State of Texas.

3. Defendant Policy Management Systems Corporation is an employer within the meaning of the 29 U.S.C. section 621 et seq. Said Defendant is a South Carolina corporation that may be served by serving its agent for service, C.T. Corporation System, 350 N. St. Paul Street, Dallas, Texas 75201.

4. Defendant General Information Services, A Division of Policy Management Systems Corporation, is an employer within the meaning of the 29 U.S.C. Section 621 et seq. Said Defendant is a South Carolina corporation that may be served by serving its agent for service, C.T. Corporation System, 350 N. St. Paul Street, Dallas, Texas 75201.

5. Defendant Cybertek Corporation is an employer within the meaning of the 29 U.S.C. Section 621 et seq. Said Defendant is a Texas corporation that may be served by serving its agent for service, C.T. Corporation System, 811 Dallas Avenue, Houston, Texas 77002.

6. This is a proceeding for a declaratory judgment, injunctive and other relief to secure the rights of Plaintiff under the Americans with Disabilities Act of 1991 and TEX. LAB. CODE. ANN § 451.001 (Vernon Supp. 1995). It is brought to prevent Defendants from maintaining a policy, practice, custom or usage, of discriminating against Plaintiff in regard to compensation, terms, conditions and privileges of employment.

7. Plaintiff says Defendants discriminated against her on account of her documented disability and for

having instituted a workers' compensation proceeding in the following and other respects:

a. By terminating her;

b. By discriminating against her in the terms, conditions and privileges of her employment;

c. By failing to accommodate her disability.

8. Within the Appropriate time of the acts of which she complains, Plaintiff filed charges of discrimination and disability with the Equal Opportunity Commission. Thereafter, Plaintiff received from said Commission(s) her notices of right-to-sue with respect to her charges of discrimination and disability, and she timely filed suit. All conditions precedent to the filing of this action have been fulfilled.

9. Plaintiff would also show that she was discharged on or about July 15, 1994.

10. Plaintiff has no plan or adequate remedy at law to correct the wrongs complained of herein, and this suit for declaratory and injunctive relief is her only means of securing relief. Further, Plaintiff is now suffering and will continue to suffer irreparable injury from Defendant's policies, practices, customs, and usages set forth herein.

WHEREFORE, Plaintiff respectfully prays that this Court:

a. Grant Plaintiff a permanent injunction, enjoining Defendant, its agents, employees, successors, assigns and all persons in active concert or participation with it, from discriminating against her;

b. Grant Plaintiff a declaratory judgment, declaring Defendant's practices complained of herein to be in violation of Law;

c. Grant Plaintiff backpay, frontpay, damages, exemplary damages or any other appropriate relief to compensate her for the wrongs complained of herein;

d. Grant attorney's fees appropriately recoverable and costs of Court;

e. Grant such other and further relief, including pre-judgment and post-judgment interest, at law or in equity, as the Court deems necessary and proper.

Respectfully submitted,

/s/ **John E. Wall, Jr.**
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ATTORNEY FOR PLAINTIFF

REQUEST FOR JURY TRIAL

Plaintiff hereby requests trial by jury.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CAROLYN C. CLEVELAND	§	
	§	
V.	§	
	§	
POLICY MANAGEMENT	§	CIVIL ACTION NO.
SYSTEMS CORPORATION,	§	395CV2140-H
GENERAL INFORMATION	§	
SERVICES, A DIVISION	§	
OF POLICY	§	
MANAGEMENT SYSTEMS	§	
CORPORATION and	§	
CYBERTEK CORPORATION	§	

DEFENDANTS' ORIGINAL ANSWER

COME NOW Policy Management Systems Corporation, General Information Services, and Cybertek Corporation, Defendants in the above styled and numbered cause, and in response to Plaintiff's original Complaint, file the following Original Answer:

1. Defendants admit that this Court has jurisdiction of this matter. Except as otherwise specifically admitted herein, Defendants deny the remaining allegations of paragraph 1 of Plaintiff's Original Complaint.

2. Defendants admit that, upon information and belief, Plaintiff is a resident of Dallas County. Defendants further admit that Plaintiff was an employee of Policy Management Systems Corporation. Defendants further admit that General Information Services is a division of Policy Management Systems Corporation, but is not a separate legal entity. Defendants specifically deny that

Plaintiff was ever an employee of Cybertek Corporation. Defendants further specifically deny that Plaintiff was subjected to unlawful employment practices. Except as otherwise specifically admitted herein, Defendants deny the remaining allegations of Paragraph 2 of Plaintiff's Original Complaint.

3. Defendant Policy Management Systems Corporation makes no response to Paragraph 3 of Plaintiff's Original Complaint because same is jurisdictional and requires no specific response of this Defendant.

4. Defendant General Information Services denies that it was Plaintiff's employer or that it is a South Carolina corporation. Defendant General Information Services makes no response to the remaining allegations of Paragraph 4 of Plaintiff's Original Complaint because same are jurisdictional and require no specific response to this Defendant.

5. Defendant Cybertek Corporation denies that it was Plaintiff's employer. Defendant Cybertek Corporation makes no response to the remaining allegations of Paragraph 5 of Plaintiff's Original Complaint because same are jurisdictional and require no specific response of this Defendant.

6. Defendants deny the allegations of Paragraph 6 of Plaintiff's Original Complaint.

7. Defendants deny the allegations of Paragraph 7 of Plaintiff's Original Complaint.

8. Defendants admit that Plaintiff filed a claim with the Equal Employment Opportunity Commission. Except as otherwise specifically admitted herein, Defendants

deny the remaining allegations of Paragraph 7 of Plaintiff's Original Complaint.

9. Defendants admit that Plaintiff was discharged from her employment with Policy Management Systems Corporation on or about July 15, 1994.

10. Defendants deny the allegations of Paragraph 10 of Plaintiff's Original Complaint.

AFFIRMATIVE DEFENSES

1. Plaintiff's Original Complaint fails to state a claim upon which relief may be granted as to Defendant Cybertek Corporation because it has not and never has been Plaintiff's employer.

2. Plaintiff's Original Complaint fails to state a claim upon which relief may be granted as to Defendant General Information Services because it has not and never has been Plaintiff's employer.

WHEREFORE, PREMISES CONSIDERED, Defendants Policy Management Systems Corporation, General Information Services, and Cybertek Corporation respectfully pray that upon final hearing hereof, judgment be rendered that Plaintiff take nothing by her suit and that

these Defendants go hence without day and recover their costs in this behalf expended.

Respectfully submitted,

/s/ David N. Kitner
DAVID N. KITNER
State Bar No. 11541500
KIMBERLY S. MOORE
State Bar. No. 00784629
901 Main Street, Suite 4330
Dallas, Texas 75202
(214) 651-4300
FAX – (214) 651-4330

ATTORNEYS FOR DEFENDANTS POLICY MANAGEMENT SYSTEMS CORPORATION, GENERAL INFORMATION SERVICES, A DIVISION OF POLICY MANAGEMENT SYSTEMS CORPORATION, AND CYBERTEK CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all counsel of record in accordance with the Federal Rules of Civil Procedure on the 19 day of October, 1995.

/s/ David N. Kitner
DAVID N. KITNER

DISABILITY REPORT

PLEASE PRINT, TYPE, OR WRITE CLEARLY AND ANSWER ALL ITEMS TO THE BEST OF YOUR ABILITY. If you are filing on behalf of someone else, enter his or her name and social security number in the space provided and answer all questions. COMPLETE ANSWERS WILL AID IN PROCESSING THE CLAIM.

PRIVACY ACT/PAPERWORK REDUCTION ACT NOTICE: • • •

A. NAME OF CLAIMANT *Carolyn Ann Cleveland*[1]

B. SOCIAL SECURITY NUMBER *530/26/0461*

C. TELEPHONE NUMBER where you can be reached (include area code) ~~*817*~~ *214-238-9150*

D. WHAT IS YOUR DISABLING CONDITION? (Briefly explain the injury or illness that stops you from working.) *Stroke – which effected [sic] speech & comprehension*

PART I – INFORMATION ABOUT YOUR CONDITION

1. When did your condition first bother you: MONTH *Jan* DAY *7* YEAR *94*

2A. Did you work after the date shown in item 1? (If "no" go on to items 3A and 3B.) [ ] YES [✓] NO

• • •

3A. When did your condition finally make you stop working?

MONTH *JAN* DAY *7* YEAR *94*

---

[1] All italicized type indicates handwritten entries.

3B. Explain how your condition now keeps you from working.

Cannot communicate. Have difficulty naming objects, recalling names. Confusion in pronouns. Written communication does not make sense.

PART II – INFORMATION ABOUT YOUR MEDICAL RECORDS

4. List the name, address and telephone number of the doctor who has the latest medical records about your disabling condition.

If you have no doctor check [ ]

NAME *Howard Fish, M.D.*

ADDRESS *2301 W. Parker Rd*
Suite 3
Plano, Tx. 75023

TELEPHONE NUMBER (include area code)
214-867-5226

HOW OFTEN DO YOU SEE THIS DOCTOR? *twice monthly*

DATE YOU **FIRST** SAW THIS DOCTOR *he was first consulted Jan 10*

DATE YOU **LAST** SAW THIS DOCTOR *Jan. 19*

REASONS FOR VISITS (show illness or injury for which you had an examination or treatment)

Also see Dr. Steven Herzog, Neurologist, twice monthly – Dr. Herzog treated patient at Baylor Hospital & will continue treatment Blood check every 2 wks.

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

Speech therapy

5A. Have you seen any other doctors since your disabling condition began?

If "yes", show the following: [ ] YES [ ] NO

NAME *Dr. Steven Herzog*
712 N. Washington Av.

ADDRESS *712 N. Washington Ave.*
Dls. 75246

TELEPHONE NUMBER (include area code)
214-827-3610

HOW OFTEN DO YOU SEE THIS DOCTOR? *twice monthly*

DATE YOU **FIRST** SAW THIS DOCTOR *1-11*

DATE YOU **LAST** SAW THIS DOCTOR *1-13*

REASONS FOR VISITS (show illness or injury for which you had an examination or treatment)

Taken to Baylor Emergency Room for stroke related symptoms

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the

medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

Tyclid for bloodthinner

5B. Identify below any other doctor you have seen since your illness or injury began.

NAME *Emergency Room Dr at Richardson Medical Hospital*

ADDRESS

TELEPHONE NUMBER (include area code)

HOW OFTEN DO YOU SEE THIS DOCTOR? *Emergency Rm only*

DATE YOU **FIRST** SAW THIS DOCTOR *1-8-94*

DATE YOU **LAST** SAW THIS DOCTOR *1-8-94*

REASONS FOR VISITS (show illness or injury for which you had an examination or treatment.)

Emergency Rm treatment

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

Cat Scan/Bloodtests

6A. Have you been hospitalized or treated at a clinic for your disabling condition?

If "yes", show the following: [✓] YES [ ] NO

NAME OF HOSPITAL OR CLINIC *Baylor Hospital*

ADDRESS *3500 Gaston Ave*
Dls 75246

PATIENT OR CLINIC NUMBER

WERE YOU AN INPATIENT? (stayed at least overnight?)

[✓] YES [ ] NO (*If "yes", show:*)

WERE YOU AN OUTPATIENT?

[ ] YES [ ] NO (*If "yes", show:*)

DATES OF ADMISSIONS *1-11*

DATES OF DISCHARGES *1-13*

DATES OF VISITS

REASON FOR HOSPITALIZATION OR CLINIC VISITS (show illness or injury for which you had an examination or treatment.)

Stroke related tests

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

tyclid –

MRI – arteriogram-blood tests

6B. If you have been in other hospital or clinic for your illness or injury, identify it below.

NAME OF HOSPITAL OR CLINIC *Richardson Medical Hosp.*

ADDRESS *401 W. Campbell*
Richardson 75080

PATIENT OR CLINIC NUMBER

WERE YOU AN INPATIENT? (stayed at least overnight?)

[ ] YES [✓] NO (If "yes", show:)

WERE YOU AN OUTPATIENT?

[ ] YES [✓] NO (If "yes", show:)

DATES OF ADMISSIONS

DATES OF DISCHARGES

DATES OF VISITS

REASON FOR HOSPITALIZATION OR CLINIC VISITS (show illness or injury for which you had an examination or treatment.)

Emergency Room treatment

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

Catscan – Blood tests

If you have been in other hospitals or clinics for you illness or injury, list the names, addresses, patient or clinic numbers, dates and reasons for hospitalization or clinic visits in Part VI.

Have you been seen by other agencies for your disabling condition?

(VA, Workmen's Compensation, Vocational Rehabilitation, Welfare, etc.)

(If "yes," show the following.) [✓] YES [ ] NO

NAME OF AGENCY *Dls Co. Human Services*

ADDRESS *2377 N. Stemmons Frwy*
Suite 201, LB16
DLS 75207

YOUR CLAIM NUMBER *None-Assigned*

DATE OF VISITS *1-14-94*

TYPE OF TREATMENT, EXAMINATION OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicine you take for your illness or injury, if known, if no treatment or medicines, show "NONE".)

None

If more space is needed, list the other agencies, their addresses, your claim numbers, dates, and treatment received in Part VI.

* * *

15C. Describe the kind and amount of physical activity this job involved during typical day in terms of:

- **Walking** (circle the number of hours a day spent walking) – 0 [*1*] 2 3 4 5 6 7 8
- **Standing** (circle the number of hours a day spent standing) – [*0*] 1 2 3 4 5 6 7 8
- **Sitting** (circle the number of hours a day spent sitting) – 0 1 2 3 4 5 6 [*7*] 8
- **Bending** (circle how often a day you had to bend) – Never – [*Occasionally*] – Frequently – Constantly
- **Reaching** (circle how often a day you had to reach) – [*Never*] – Occasionally – Frequently – Constantly

- **Lifting and Carrying**: Describe below what was lifted, and how far it was carried. Check heaviest weight lifted, and weight frequently lifted and/or carried: *N/A*

* * *

Knowing that anyone making a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law. I certify that the above statements are true.

NAME (Signature of claimant or person filing on the claimant's behalf)

SIGN HERE */s/ Carolyn Cleveland* DATE *1-21-94*

* * *

JAN 28 94
SSA D0814 DALLAS TX

APPLICATION FOR DISABILITY
INSURANCE BENEFITS

I APPLY FOR A PERIOD OF DISABILITY AND/OR ALL INSURANCE BENEFITS FOR WHICH I AM ELIGIBLE UNDER TITLE II AND PART A OF TITLE XVIII OF THE SOCIAL SECURITY ACT, AS PRESENTLY AMENDED.

MY NAME IS CAROLYN C CLEVELAND.

MY NAME AT BIRTH WAS CAROLYN COLLIER.

MY SOCIAL SECURITY NUMBER IS 530-26-0461.

MY DATE OF BIRTH IS AUGUST 17, 1935.

I BECAME UNABLE TO WORK BECAUSE OF MY DISABLING CONDITION ON JANUARY 07, 1994.

I AM STILL DISABLED.

NO PREVIOUS APPLICATION HAS BEEN FILED WITH THE SOCIAL SECURITY ADMINISTRATION BY OR FOR ME.

I HAVE NOT FILED NOR DO I INTEND TO FILE FOR ANY WORKERS' COMPENSATION, PUBLIC DISABILITY OR BLACK LUNG BENEFITS.

I AM NOT ENTITLED TO NOR DO I EXPECT TO BECOME ENTITLED TO A PENSION OR ANNUITY BASED IN WHOLE OR IN PART ON WORK AFTER 1956 NOT COVERED BY SOCIAL SECURITY.

THE SOCIAL SECURITY ADMINISTRATION AND THE STATE AGENCY REVIEWING MY CLAIM DOES HAVE MY PERMISSION TO CONTACT MY EMPLOYER(S).

TRC-803 (3/89)

I AM NOT MARRIED NOW.

* * *

I DO NOT HAVE ANY CHILDREN WHO MAY BE ELIGIBLE FOR SOCIAL SECURITY BENEFITS ON THIS RECORD

I UNDERSTAND THAT I MUST PROVIDE MEDICAL EVIDENCE ABOUT MY DISABILITY, OR ASSIST THE SOCIAL SECURITY ADMINISTRATION IN OBTAINING THE EVIDENCE.

I UNDERSTAND THAT I MAY BE REQUESTED BY THE STATE DISABILITY DETERMINATION SERVICES TO HAVE A CONSULTATIVE EXAMINATION AT THE EXPENSE OF THE SOCIAL SECURITY ADMINISTRATION AND THAT IF I DO NOT GO, MY CLAIM MAY BE DENIED.

I AUTHORIZE ANY PHYSICIAN, HOSPITAL, AGENCY, OR OTHER ORGANIZATION TO DISCLOSE ANY MEDICAL RECORD OR INFORMATION ABOUT MY DISABILITY TO THE SOCIAL SECURITY ADMINISTRATION OR TO THE STATE DISABILITY DETERMINATION SERVICES THAT MAY REVIEW MY CLAIM OR CONTINUING DISABILITY.

I AUTHORIZE THE SOCIAL SECURITY ADMINISTRATION TO RELEASE ANY INFORMATION ABOUT ME TO A PHYSICIAN OR MEDICAL FACILITY PREPARATORY TO AN EXAMINATION OR TEST. RESULTS OF SUCH EXAMINATION OR TEST MAY BE RELEASED TO MY PHYSICIAN OR OTHER TREATING SOURCE.

I AUTHORIZE THAT INFORMATION ABOUT MY DISABILITY MAY BE FURNISHED TO ANY CONTRACTOR FOR CLERICAL SERVICES BY THE STATE DISABILITY DETERMINATION SERVICES.

I AGREE TO NOTIFY THE SOCIAL SECURITY ADMINISTRATION OF ALL EVENTS AS EXPLAINED TO ME.

I AGREE TO NOTIFY THE SOCIAL SECURITY ADMINISTRATION IF:

- MY MEDICAL CONDITION IMPROVES SO THAT I WOULD BE able TO WORK, EVEN

THOUGH I HAVE NOT YET RETURNED TO WORK.

- I GO TO WORK WHETHER AS AN EMPLOYEE OR A SELF-EMPLOYED PERSON.

- I APPLY FOR OR RECEIVE A DECISION ON BENEFITS UNDER ANY WORKERS' COMPENSATION LAW OR PLAN (INCLUDING BLACK LUNG BENEFITS FROM THE DEPARTMENT OF LABOR), OR OTHER PUBLIC BENEFIT BASED ON DISABILITY.

- I AM IMPRISONED FOR CONVICTION OF A FELONY.

THE ABOVE EVENTS MAY AFFECT MY ELIGIBILTY TO [SIC] DISABILITY BENEFITS AS PROVIDED IN THE SOCIAL SECURITY ACT, AS AMENDED.

I AM NOT SUBMITTING EVIDENCE OF EARNINGS THAT ARE NOT YET ON MY EARNINGS RECORD. I UNDERSTAND THAT THESE EARNINGS WILL BE INCLUDED AUTOMATICALLY WITHIN 24 MONTHS, AND ANY INCREASE IN MY BENEFITS WILL BE PAID WITH FULL RETROACTIVITY.

I AGREE TO NOTIFY THE SOCIAL SECURITY ADMINISTRATION IF I BECOME ENTITLED TO A PENSION OR ANNUITY BASED ON EMPLOYMENT AFTER 1956 NOT COVERED BY SOCIAL SECURITY, OR IF SUCH PENSION OR ANNUITY STOPS.

MY REPORTING RESPONSIBILITIES HAVE BEEN EXPLAINED TO ME.

REMARKS:
MY EARNINGS ARE CORRECT AS POSTED. MY EARNINGS FELL TO $15,107 IN 1992 BECAUSE I DID NOT WORK PART OF THAT YEAR.

I KNOW THAT ANYONE WHO MAKES OR CAUSES TO BE MADE A FALSE STATEMENT OR REPRESENTATION OF MATERIAL FACT IN AN APPLICATION OR FOR USE IN DETERMINING A RIGHT TO PAYMENT UNDER THE SOCIAL SECURITY ACT COMMITS A CRIME PUNISHABLE UNDER FEDERAL LAW BY FINE, IMPRISONMENT OR BOTH. I AFFIRM THAT ALL INFORMATION I HAVE GIVEN IN CONNECTION WITH THIS CLAIM IS TRUE.

MY MAILING ADDRESS IS 1806 SERENADE

RICHARDSON TX 75081

MY TELEPHONE NUMBER IS (214) 238-9150.

SIGNATURE /s/ *Carolyn Cleveland* DATE *1-26-94*

* * *

AUTHORIZATION FOR SOURCE TO RELEASE INFORMATION TO THE SOCIAL SECURITY ADMINISTRATION (SSA)

* * *

The reason for the release of this Medical information is to allow the recipient to evaluate my claim for benefits under the Social Security Act.

/s/ Carolyn Cleveland *self* *1-26-94*

* * *

[LOGO]
Texas
Rehabilitation
Commission
A Human Energy Agency

VERNON M. ARRELL
Commissioner

February 23, 1994

X 1st Request

Carolyn C. Cleveland
1806 Serenade
Richardson, TX 75081

SSN: 530 26 0461

Dear Mr./Ms. Cleveland:

The Social Security Administration has forwarded your disability file to this agency for medical development and decision. To help us properly evaluate your case, please complete the information on the attached form. Please

sign this form on the last page and return it to us within ten days. A postage-paid return envelope is enclosed for your use.

* * *

Sincerely,

/s/ Kathy Graves
Kathy Graves
Disability Examiner
(512) 445-8616

(IF THE REQUESTED INFORMATION IS NOT RECEIVED WITHIN TEN DAYS OF OUR SECOND REQUEST, A DECISION WILL BE MADE ON THE EVIDENCE IN FILE WHICH MAY RESULT IN A FINDING OF NO DISABILITY. IF YOU ARE RECEIVING CHECKS, THESE CHECKS MAY STOP.)

* * *

VOCATIONAL REPORT

[Original document stamped received by the SSA on March 22, 1994]

* * *

A. Name of Claimant
Carolyn C. Cleveland

B. Social Security Number
530-26-0461

PART I – INFORMATION ABOUT YOUR WORK HISTORY

* * *

JOB TITLE
(Be sure to begin with your usual job)
1. *Telephone Investigator*
2. *Employment Mgr.*

TYPE OF BUSINESS
1. *Checking past usually pre-emp.*
2. *Mfg*

DATES WORKED (Month and Year)			DAYS PER WEEK	RATE OF PAY (Per hour, day, week, month or year)
	FROM	TO		
1.	*4-31-93*	*1-7-94*	*M-F*	*8.31 hr.*
2.	*1-17-76*	*4-7-92*	*M-F*	*31,500 K*

* * *

PART II – INFORMATION ABOUT YOUR JOB DUTIES

Provide the following information (on pages 2-5) for each of the jobs listed in Part I starting with your usual job:

Job Title (from Part I):

A. In your job did you:
- Use machines, tools, or equipment of any kind?
[ ] Yes [✓] No

- Use technical knowledge or skills?
  [✓] Yes [ ] No
- Do any writing, complete reports, or perform similar duties?
  [✓] Yes [ ] No
- Have supervisory responsibilities?
  [✓] Yes [ ] No

B. Describe your basic duties (explain what you did and how you did it) below. Also, explain all "Yes" answers by giving a FULL DESCRIPTION of: the types of machines, tools, or equipment you used and the exact operation you performed; the technical knowledge or skills involved; the type of writing you did, and the nature of any reports; and the number of people you supervised and the extent of your supervision:

1. *Calling past employers, education, credit, criminal history, interviews on phone.*

2.*Interview all applicants, pre-employment references, letters to applicants not hired, schedule drug testing, trained managers & supervisors. Responded to all unemployment insurance claims, prepared employment ads.*

C. Describe the kind and amount of physical activity this job involved during a typical day in terms of:

- **Walking** (circle the number of hours a day spent walking) –
  0 1 2 3 4 5 6 7 8
- **Standing** (circle the number of hours a day spent standing) –
  0 1 2 3 4 5 6 7 8

- **Sitting** (circle the number of hours a day spent sitting) –
  0 1 2 3 4 5 6 7 8
- **Bending** (circle how often a day you had to bend) –
  Never – *Occasionally* – Frequently – Constantly

• **Lifting and Carrying:** Describe what was lifted, and how far it was carried. Check below heaviest weight lifted, and weight frequently lifted and/or carried. *None*

• • •

Job Title (from Part I):

A. In your job did you:
- Use machines, tools, or equipment of any kind?
  [✓] Yes [ ] No
- Use technical knowledge or skills?
  [✓] Yes [ ] No
- Do any writing, complete reports, or perform similar duties?
  [✓] Yes [ ] No
- Have supervisory responsibilities?
  [✓] Yes [ ] No

B. Describe your basic duties (explain what you did and how you did it) below. Also, explain all "Yes" answers by giving a FULL DESCRIPTION of: the types of machines, tools, or equipment you used and the exact operation you performed; the technical knowledge or skills involved; the type of writing you did, and the nature of any reports; and the number of

people you supervised and the extent of your supervision:

Telephone, computer, fax, a disability laws, employment laws, insurance.

C. Describe the kind and amount of physical activity this job involved during a typical day in terms of:

- **Walking** (circle the number of hours a day spent walking) –
  0 1 2 3 4 5 6 7 8
- **Standing** (circle the number of hours a day spent standing) –
  0 1 2 3 4 5 6 7 8
- **Sitting** (circle the number of hours a day spent sitting) –
  0 1 2 3 4 5 6 7 8
- **Bending** (circle how often a day you had to bend) –
  Never – *Occasionally* – Frequently – Constantly

- **Lifting and Carrying:** Describe what was lifted, and how far it was carried. Check below heaviest weight lifted, and weight frequently lifted and/or carried. _____

• • •

1. Signature of Witness
   Carolyn Cleveland

Address (Number and street, city, state, and ZIP code)
1806 Serenade Ln. – Richardson, TX

_____

Claimant's Name
CLEVELAND, CAROLYN C
1806 SERENADE
RICHARDSON TX
DALLAS

Soc. Sec. Number

SUPPLEMENTAL QUESTIONNAIRE

This information will help us understand your condition and how it affects you. If you need more space to answer any question, there is room at the end of this form or you may attach extra pages.

1. Describe your symptoms (for example: pain, fatigue, weakness, shortness of breath, etc.). *headaches, weakness, shortness of breath*

   A. What brings on your symptoms or makes them worse? *Staying up for over three hours*

   B. If you have pain, where is it located? *head where stroke*

   C. How often do your symptoms occur, (per day, per week, etc.)? *per day*

   D. Have your symptoms changed since you began having them? YES [✓] NO [ ] If YES, describe how they have changed. *can stay up longer*

   E. How does your impairment affect your ability to complete routine activities or chores? Give examples. speech headache

2. Do you take medicine to relieve your symptoms? YES [✓] NO [ ]

A. If YES, what kind? *Tichid Zoloft (illegible)*

B. How much and how often do you take it? *daily*

C. Does your medicine help? YES [✓] NO [ ]. If YES, how much and for how long? *illegible*

D. Is there any reason you do not take your medicine? YES [ ] NO [✓]
If YES, explain. _____

3. Do you wear or use anything, other than medicine, to relieve your symptoms? YES [ ] NO [ ]. If YES, explain. *illegible*

4. Is there anything else you do to relieve your symptoms? *sleep*

5. What do you do for exercise? *grocery shopping, clean house, work outside*

6. Describe what you do on an average day, what takes most of your time during the day, etc. *breakfast, sleep until headache is gone, shower, dress, clean or straighten house, read ___ illegible, speech therapy, illegible, sleep, watch TV 4-5, wash clothes, dinner, read, sleep*

7. What activities are you not able to do now because of your symptoms that you were able to do in the past?
Work/Housework *yardwork, move furniture, change lightbulbs, clean as thorough*

Recreation *read, visit company, write letters*

Personal care (grooming, bathing, dressing, etc.) *none*

8. Do your symptoms affect your ability to perform any of the following activities? If YES, describe how.

YES	NO		
[✓]	[ ]	–	Sitting *not as long*
[✓]	[ ]	–	Standing *not as long*
[✓]	[ ]	–	Walking *not as long*
[✓]	[ ]	–	Lifting/Carrying *heavy sacks*
[ ]	[✓]	–	Using your hands _____
[ ]	[✓]	–	Bending _____
[✓]	[ ]	–	Kneeling, squatting _____
[✓]	[ ]	–	Climbing _____
[ ]	[✓]	–	Reaching forward _____
[✓]	[ ]	–	Working or reaching overhead ___
[✓]	[ ]	–	Hearing *not as well*
[✓]	[ ]	–	Speaking _____
[ ]	[✓]	–	Traveling to and from work _____
[ ]	[ ]	–	Reading the newspaper *sometimes*
[✓]	[ ]	–	Watching TV _____
[✓]	[ ]	–	Driving the car _____
[✓]	[ ]	–	Using the telephone _____

9. Please give your height *5'6"* and weight *164*. Is there anything else you wish to state about your condition? YES [ ] NO [ ]. If YES, state it here. *yes, have probably understanding long message or getting long numbers wright* [sic], could speak normal but impairing [sic.]

10. We may need to contact other people for information about your condition. Please list the names, addresses, and phone numbers of your spouse, relative(s) or friend(s) who are familiar with how your

condition affects your activities. If you have the names and phone numbers of additional persons we may contact, please list on the last page. (Do not list doctors.)

A. Name *Sheri Short*

Relationship *daughter*

Address *1800 Hilltop*
Arlington, TX

Daytime phone *817-884-2770*

Home phone *817-548-1460*

B. Name *Stephanie Hambrick*

Relationship *daughter*

Address *5605 illegible*
Rowlett, TX 75088

Daytime phone *illegible*

Home phone _____

11. Do you have any significant mental or emotional problems? YES [ ] NO [✓] If YES, explain. ____

12. Do your mental or emotional problems significantly affect your day to day living or work? YES [ ] NO [✓]. If YES, explain. _____

13. Have you ever received any mental or emotional treatment? YES [✓] NO [ ] If YES, what kind of treatment, where, when and by whom?. *alcoholics anonymous 3-14-92 – present*

14. Do you think that you need a mental or emotional evaluation in regard to your application for disability benefits? YES [ ] NO [✓]. Explain. _____

IF ANY OF THE ABOVE 4 QUESTIONS (#11-14) CONCERNING POSSIBLE MENTAL OR EMOTIONAL PROBLEMS WERE ANSWERED YES, PLEASE COMPLETE THE REMAINING PORTION OF THIS QUESTIONNAIRE. IF YOU ANSWERED NO TO ALL 4 QUESTION, STOP HERE. SIGN AND DATE THE LAST PAGE.

15. Do you have a counselor or social worker? YES [✓] NO [ ]. If YES, provide name, address, work, phone number, and date last seen. *3-7-94 Jesse Jordan – Dept. of Human Services, 2377 Stemmons Frwy., Suite 201-LB16, Dallas 75207, 214-819-1833*

16. Do you need another person's help, reminders or supervision in performing/completing any of the following activities? If YES, explain.

YES	NO	
[ ]	[✓]	– Bathing _____
[ ]	[✓]	– Brushing your teeth _____
[ ]	[✓]	– Fixing your hair _____
[ ]	[✓]	– Shaving _____
[ ]	[✓]	– Selecting appropriate clothing ____

YES	NO	
[ ]	[✓]	– Cooking _____
[✓]	[ ]	– Paying bills _____
[✓]	[ ]	– Visiting *at times*
[ ]	[✓]	– Shopping/making change _____
[✓]	[ ]	– Riding the bus _____
[✓]	[ ]	– Taking care of children *for short times*

17. Do you have difficulty keeping your mind or attention on a task/activity? YES [✓] NO [ ]. If YES, explain. _____

18. Do you have difficulty completing tasks? YES [✓] NO [ ]. If YES, explain. *yard, cleaning house*

19. Do you have problems making decisions? YES [✓] NO [ ]. If YES, explain. *fear of if I return to job*

20. What upsets you? *fear of returning to work*

21. When your daily routine changes, how do you react? *appreciate some change*

22. When you have stress/pressure, how do you react?

    At home *Calm down, ask for help and pray*

    When you worked *haven't returned*

    How often does it happen? _____

23. How do/did you get along with other people?

    At home *Well*

    When you worked *well*

24. What do you do when someone criticizes you or tells you what to do? *appreciate the help*

25. Is there anything else you wish to state about your mental or emotional condition and how it prevents you from working? YES [✓] NO [✓]. If YES, state it here.

    to speak well & retaining what I hear better

Signature of Claimant *Carolyn Cleveland* Date *3-16-94*

Form Completed By _____

Relationship to Claimant _____

* * *

DATE/FECHA: *4/20/94*

NAME: *Carolyn C. Cleveland* SSN: *530-26-0461*

THE SOCIAL SECURITY ADMINISTRATION HAS FORWARDED YOUR DISABILITY FILE TO THIS AGENCY FOR DEVELOPMENT AND DECISION. WE NEED ADDITIONAL INFORMATION WHICH ONLY YOU CAN SUPPLY. PLEASE CALL ME AT THE NUMBER SHOWN BELOW BETWEEN 9:00 A.M. AND 3:00 P.M. THIS CALL IS FREE FROM ANY TELEPHONE. IF YOU DO NOT RESPOND WITHIN 10 DAYS, THIS MAY RESULT IN A FINDING OF NO DISABILITY; OR IF YOU ARE RECEIVING CHECKS, THOSE CHECKS MAY STOP.

1-800-252-7009, EXT 8616

_____

DISABILITY EXAMINER/EXAMINADOR(A) DE INCAPACIDAD; UNIT/UNIDAD; NO.

Pls call me immediately regarding your current doctors and when you were last seen. I have already left 2 mssgs for you.

* * *

DATE/FECHA: *4/20/94*

NAME: *Carolyn C. Cleveland* SSN: *530-26-0461*

THE SOCIAL SECURITY ADMINISTRATION HAS FORWARDED YOUR DISABILITY FILE TO THIS AGENCY FOR DEVELOPMENT AND DECISION. WE NEED ADDITIONAL INFORMATION WHICH ONLY YOU CAN SUPPLY. PLEASE CALL ME AT THE NUMBER SHOWN BELOW BETWEEN 9:00 A.M. AND 3:00 P.M. THIS CALL IS FREE FROM ANY TELEPHONE. IF YOU DO NOT RESPOND WITHIN 10 DAYS, THIS MAY RESULT IN A FINDING OF NO DISABILITY; OR IF YOU ARE RECEIVING CHECKS, THOSE CHECKS MAY STOP.

None were received.

1-800-252-7009, EXT 8616

DISABILITY EXAMINER/EXAMINADOR(A) DE INCAPACIDAD; UNIT/UNIDAD; NO.

Pls call me immediately regarding your current doctors and when you were last seen. I have already left 2 mssgs for you.

* * *

4-23-94.

Have tried to contact Kathy Graves and have been unable to reach her. I did return to work in April.

Carolyn Cleveland

Social Security
Notice of Disapproved Claim

From: Department of Health and Human Services
Social Security Administration

Date: 07/11/94

Caroly C. Cleveland
1806 Serenade
Richardson, TX 75081

Claim Number: 530-26-0461

We have determined that you are not entitled to disability insurance benefits because you cannot be considered under a disability within the meaning of the law. It has been determined from the evidence that the work you are

doing despite your handicap shows you are able to do some type of substantial gainful work. Attached to this notice is an explanation of the decision we made on your claim and how we arrived at it.

* * *

DISABILITY DETERMINATION RATIONALE

Name of Claimant
Carolyn Cleveland

SSN
530-26-0461

We have received notification that you began working full time as of April 21, 1994 with earnings greater than $500 per month. We understand that this work is continuing and that you fully earn your salary.

Work activity for earnings which average more than $500.00 per month is generally considered substantial gainful activity. Your claim must be denied because you are working and fully earning more than $500.00 per month.

CLAIM REP (DO-BGA DETERM)
ILLEGIBLE

Date
7/11/94

[LOGO]

General Information Services
A Division of Policy Management Systems Corporation

12377 Merit Drive, Suite 800 • Dallas, TX 75251
P.O. Box 517018 • Dallas, TX 75251-7018
(214) 702-3845 • FAX (214) 934-0647

June 3, 1994

To: Carolyn Cleveland

From: Debra Levine

Re: Trainee status/Performance evaluation

Carolyn,

This is to inform you that your status as a Trainee is nearing an end. The normal time span that an employee is in training is three to six months. You have been with GIS for nine months; however, I have taken into account that you were out for three months.

There are some concerns as to your performance as an Inspector. The focus for the majority of those concerns is the fact that you don't seem to be consulting the CIF (Client Information Form) for each client before beginning work on each case. This is a necessity for all inspectors, due to the fact that each client has such different requirements.

Another concern is that many of your reports either include too much information, or are missing necessary information. I feel that this would be rectified by consulting the CIF before working each report. I believe that we have addressed and hopefully solved the problem concerning the summaries and status due most of the clients.

Carolyn, I know that you have been trying hard and feel that you have been doing the best you can, but the number of cases that you complete is not acceptable. You must strive to improve the quality and quantity of the reports you work.

This evaluation is to enlighten you to some of the problems I have encountered with your work, and to inform you of some upcoming changes.

At the end of this month, on June 30, 1994, your employee status will be subject to change to that of a Fee Inspector. However, if there are not some drastic changes in the quality of work that you produce, you are subject to be separated from the company.

/s/ *Carolyn Cleveland* 6-3-94
Carolyn Cleveland Date

/s/ *Debra Levine* 6/3/94
Debra Levine, Report Supervisor Date

June 21, 1994

To: Carolyn Cleveland

From: Debra Levine

Re: Extension of Training Period

Carolyn, per your request dated June 9, 1994, I am extending your training period. I am willing to work with you as much as is necessary in order to improve the quality and quantity of your work. However, please understand that this is the final extension I can approve.

Therefore, on August 1, 1994, the same status changes discussed previously (moving to a fee reporter status or separation from the company) will be determined.

I have seen some improvement; however, I cannot stress enough how important it is that the improvement continue.

/s/ *Carolyn Cleveland* *6-21-94*
Carolyn Cleveland Date

/s/ *Debra Levine* *6/21/94*
Debra Levine, Report Supervisor Date

THE DALLAS NEUROLOGICAL CLINIC
712 N. Washington, Suite 100
Dallas, Texas 75246
(214) 827-3610

July 26, 1994

EEOC

Re: Carolyn Cleveland

To Whom It May Concern:

Ms. Carolyn Cleveland is a patient of mine at The Dallas Neurological Clinic. I initially saw her on 1/11/94 at which time she had had a stroke in the left cerebrum affecting her language functioning. This left her with an aphasia. An aphasia is a disorder of input and output of language which affects one's reading ability, calculation ability, understanding and processing of all language function. Luckily, no further complications ensued from this stroke, and the patient was discharged in stable condition. She was left with the prominent aphasia as noted above.

At this time, some of the difficulties that we encountered upon returning to work were fear in making phone calls and forgetting the right words, fear of pressure on the phone, and fear of not having other people understand her. She was unable to retain information and facts that were not written down. She had trouble writing of reports and difficulty remembering some of the words needed and the correct spelling. She had absolutely no training in this particular type of work prior to the stroke that required changing particular job requirements. Remaining difficulties up to termination included cruel remarks and jokes about the patient's "little stroke," the

fact that she was off work for so "long a time" if no severe stroke had occurred, and mimicking and making fun of my patient, needing telephone numbers and some addresses repeated, difficulty with long numbers and extra time to double check, not allowed extra time to keep up with her work, and refused extra time. The Texas Disability Commission offered a person to come to her office to validate the problems after the stroke and provide some assistance. This was refused on two separate occasions by the patient's supervisor and on two separate occasions by the manager.

At the present time, she is much better with phone calls. They were no problems toward the end of her employment through 7/15/94. She could communicate more easily. Her spelling had improved, even with more difficult words. She had to recheck and recheck for any errors, but this was a problem which was improving. She taught herself without any particular training. She was making very few errors and made no errors at all while Debra, the supervisor, was on vacation the week prior to her termination.

On 6/21/94, Carolyn received a letter from Debra Levine regarding her extension of training period. We are enclosing a copy of this letter for your review.

IMPRESSION: Status post cerebrovascular accident (stroke) left cerebrum with resultant damage to the language center. Ms. Cleveland is continuing to improve with time, and as you can assume it sometimes takes 6-12 months to get a full recovery from a stroke. She has worked very hard to retain her job, and it appears that they were not as cooperative as could be. Obviously, I

have not spoken with any of the supervisors at work, nor reviewed a job requirement or job description as of this date. It is evident to me that my patient was trying her best to retain employment, to keep being a useful member of society, even in face of this new disability. Please assist her in every way possible.

Sincerely,

Steven P. Herzog, M.D.
Enclosure: Letter form Debra Levine

THE DALLAS NEUROLOGICAL CLINIC
712 N. Washington, Suite 100
Dallas, Texas 75246
(214) 827-3610

September 9, 1994

Re: Carolyn Cleveland

To Whom It May Concern:

Ms. Carolyn Cleveland is a patient of mine at The Dallas Neurological Clinic. She suffered with a stroke on 1/7/94 causing aphasia. This has produced complete disability and an inability to communicate on a sustained, continuing, understandable level. For this reason, I am classifying her as 100% disabled.

Sincerely,

/s/ *Steven P. Herzog*
Steven P. Herzog, M.D.

NH 530-26-0461 SG-SSA-56 PAGE 001

UNIT: 5PXPXS

REQUEST FOR RECONSIDERATION

MY NAME IS CAROLYN C CLEVELAND.

MY SOCIAL SECURITY NUMBER IS 530-26-0461.

I REQUEST A RECONSIDERATION. I DISAGREE WITH THE DETERMINATION MADE ON MY CLAIM FOR DISABILITY-WORKER OR CHILD BENEFITS BECAUSE I WAS DENIED BECAUSE I HAD RETURNED TO WORK AND WAS MAKING OVER $500. HOWEVER, ON JULY 15, 1994 I WAS TERMINATED DUE TO MY CONDITION AND I HAVE NOT BEEN ABLE TO WORK SINCE. I CONTINUE TO BE DISABLED.

I AM SUBMITTING ADDITIONAL EVIDENCE WITH THIS REQUEST.

I UNDERSTAND I HAVE A RIGHT TO BE REPRESENTED AT THE RECONSIDERATION.

SIGNATURE /s/ *Carolyn Cleveland* APPELLANT

MY ADDRESS IS 1806 SERENADE
RICHARDSON TX 75081

MY PHONE NUMBER IS 214-238-9150.

DATE SEPTEMBER 14, 1994.

WORK ACTIVITY REPORT – EMPLOYEE

Name of disabled person: *Carolyn Cleveland*

* * *

5. If either statement below applies to all jobs shown in item 2, please check:

   a. I worked 3 months or less and stopped because of my injury or illness. [✓]

   b. I continued or returned to work for the same amount or more money and my duties and my work hours are the same as before my illness. [ ]

* * *

10. Use this section for additional space to answer any previous questions and to give any additional information you think will be helpful. Please refer to the previous questions by number, such as 4 (other earnings), 7 (job requirements).

I had my stroke 1/7/94 and was out of work for several months. I attempted to return to work mid April. I worked for three months before they terminated me because I could no longer do the job because of my condition.

If more space is needed, use an extra sheet.

1. Check the appropriate block below:

   [✓] I am not receiving Social Security and/or Supplemental Security income disability benefits.

   [ ] I am receiving Social Security and/or Supplemental Security income disability benefits, and I understand that the information provided above may result in my benefits being stopped. I have been given the opportunity to submit any evidence I wanted and to make any statements concerning my claim.

Please read the following statement then sign and date, provide address and telephone number.

Knowing that anyone who makes a false statement or misrepresentation of a material fact for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law, I affirm that the answers to questions on this form are true.

A. Signature of claimant/beneficiary or representative
Carolyn C. Cleveland

B. Date
9-20-94

C. Telephone no. & area code
(214) 238-9150

D. Mailing address, (Number and street, apt. no., p.o. box, or rural route.)
1806 Serenade

E. City and state
Richardson, TX

F. Zip code
75081

G. County
Dallas

12. A. Contact made

[ ] In Person
[ ] By Mail
[✓] By Telephone

B. Completed by

[ ] Claimant
[✓] SSA Representative
[ ] Other

If other, show name, address, phone number, and relationship.

13. Interviewer/Reviewer Check List ("Yes" answers should be developed in accordance with DI00503 FF. Rationalize "Yes" or "No" answers below except when it is necessary to complete the SSA-831-U5, SSA-832-U5 or SSA-833-U5) Check all that apply:

a. Subsidy (specific or non-specific)
[ ] Yes [✓] No

b. Special considerations, situations, or assistance
[ ] Yes [✓] No

c. Impairment-related work expenses
[ ] Yes [✓] No

d. Mentally handicapped individual performs simple task subject to close supervision
[ ] Yes [✓] No

e. Unsuccessful work attempt (CDR-no medical issue – DO jurisdiction for a final determination)
[ ] Yes [✓] No

f. Unsuccessful work attempt (DO recommendation only – DDS jurisdiction for a final determination)
[✓] Yes [ ] No

g. Substantial gainful activity
[ ] Yes [✓] No

h. Trial work period (reminder item)
[ ] Yes [✓] No

* * *

RATIONALE: *Clmt's work lasted only three months and ended due to her condition – UWA.*

4. Remarks

5. Signature and title of SSA interviewer or reviewer
P. Illegible CR

16. DO code
814

17. Date
9/20/94

Claimant's Name *Carolyn Cleveland*

Soc. Sec. Number *530-26-0461*

SUPPLEMENTAL QUESTIONNAIRE

This information will help us understand your condition and how it affects you. If you need more space to answer any question, there is room at the end of this form or you may attach extra pages.

1. Describe your symptoms (for example: pain, fatigue, weakness, shortness of breath, etc.). *fatigue, difficulty w/verbal communication & written communication due to stroke. Have trouble w/comprehension – also have ashma* [sic]

   A. What brings on your symptoms or makes them worse? *stress, ozone or dust*

   B. If you have pain, where is it located? *headaches – frequent back pain*

   C. How often do your symptoms occur, (per day, per week, etc.)? *3-4 times per wk*

   D. Have your symptoms changed since you began having them? YES [ ] NO [ ] If YES, describe how they have changed. *same*

   E. How does your impairment affect your ability to complete routine activities or chores? Give examples. *can't stand for long periods, verbal & written communication affects ability to make phone calls, complete paper work & similar tasks. Slow to comprehend any form of communication, difficulty breathing*

2. Do you take medicine to relieve your symptoms? YES [✓] NO [ ]

A. If YES, what kind? *(illegible)*

B. How much and how often do you take it? *daily*

C. Does your medicine help? YES [✓] NO [ ]. If YES, how much and for how long? *prevent blood from clotting – easier breathing – reduce headaches – anxiety illegible*

D. Is there any reason you do not take your medicine? YES [ ] NO [✓]

If YES, explain. _____

3. Do you wear or use anything, other than medicine, to relieve your symptoms? YES [ ] NO [✓]. If YES, explain. _____

4. Is there anything else you do to relieve your symptoms? *stay indoors on ozone alert days*

5. What do you do for exercise? *walk – limited housework*

6. Describe what you do on an average day, what takes most of your time during the day, etc. *routine tasks – make & keep appts w/government agencies, doctors assist other stroke victims and the stroke recovery group*

7. What activities are you not able to do now because of your symptoms that you were able to do in the past?
Work/Housework *find work related to my experience, human resources, personnel*

Recreation *do most of the same things just less times*

Personal care (grooming, bathing, dressing, etc.) *no problem*

8. Do your symptoms affect your ability to perform any of the following activities? If YES, describe how.

YES	NO		
[ ]	[✓]	–	Sitting _____
[✓]	[ ]	–	Standing *for long periods*
[✓]	[ ]	–	Walking *for long periods*
[✓]	[ ]	–	Lifting/Carrying _____
[ ]	[✓]	–	Using your hands _____
[ ]	[✓]	–	Bending _____
[✓]	[ ]	–	Kneeling, squatting _____
[✓]	[ ]	–	Climbing _____
[ ]	[✓]	–	Reaching forward _____
[✓]	[ ]	–	Working or reaching overhead ___
[✓]	[ ]	–	Hearing _____
[✓]	[ ]	–	Speaking _____
[ ]	[ ]	–	Traveling to and from work *NA*
[✓]	[ ]	–	Reading the newspaper *comprehension*
[✓]	[ ]	–	Watching TV *comprehension*
[ ]	[✓]	–	Driving the car _____
[✓]	[ ]	–	Using the telephone *difficulty communicating*

9. Please give your height *5'6"* and weight *170*. Is there anything else you wish to state about your condition? YES [ ] NO[✓]. If YES, state it here.

10. We may need to contact other people for information about your condition. Please list the names, addresses, and phone numbers of your spouse, relative(s) or friend(s) who are familiar with how your

condition affects your activities. If you have the names and phone numbers of additional persons we may contact, please list on the last page. (Do not list doctors.)

A. Name *Sheri Short*

Relationship *daughter*

Address *1800 Hilltop*
Arlington, TX 76013

Daytime phone *(817) 548-1460*

Home phone *same*

B. Name *Susan Moynahan*

Relationship *daughter*

Address *14777 illegible #410*
Houston, TX illegible

Daytime phone *(713) 587-2028*

Home phone *same*

11. Do you have any significant mental or emotional problems? YES [✓] NO [ ] If YES, explain. *just symptoms already described*

12. Do your mental or emotional problems significantly affect your day to day living or work? YES [✓] NO [ ]. If YES, explain. *already described*

13. Have you ever received any mental or emotional treatment? YES [ ] NO [✓] If YES, what kind of treatment, where, when and by whom?. _____

14. Do you think that you need a mental or emotional evaluation in regard to your application for disability benefits? YES [ ] NO [✓]. Explain. _____

IF ANY OF THE ABOVE 4 QUESTIONS (#11-14) CONCERNING POSSIBLE MENTAL OR EMOTIONAL PROBLEMS WERE ANSWERED YES, PLEASE COMPLETE THE REMAINING PORTION OF THIS QUESTIONNAIRE. IF YOU ANSWERED NO TO ALL 4 QUESTION, STOP HERE. SIGN AND DATE THE LAST PAGE.

15. Do you have a counselor or social worker? YES [ ] NO [✓]. If YES, provide name, address, work, phone number, and date last seen.

16. Do you need another person's help, reminders or supervision in performing/completing any of the following activities? If YES, explain.

YES	NO		
[ ]	[✓]	–	Bathing _____
[ ]	[✓]	–	Brushing your teeth _____
[ ]	[✓]	–	Fixing your hair _____
[ ]	[✓]	–	Shaving _____
[ ]	[✓]	–	Selecting appropriate clothing ____
[ ]	[✓]	–	Cooking _____
[✓]	[ ]	–	Paying bills *comprehension*
[ ]	[✓]	–	Visiting *some problems w/ people I don't know*
[ ]	[✓]	–	Shopping/making change _____
[ ]	[✓]	–	Riding the bus _____
[ ]	[✓]	–	Taking care of children _____

17. Do you have difficulty keeping your mind or attention on a task/activity? YES [✓] NO [ ]. If YES, explain. *occasionally*

18. Do you have difficulty completing tasks? YES [✓] NO [ ]. If YES, explain. *in a timely manner due to length of time it takes to complete the task*

19. Do you have problems making decisions ? YES [✓] NO [ ]. If YES, explain. *ability to analyze situation*

20. What upsets you? *the frustration of not being able to communicate & perform tasks*

21. When your daily routine changes, how do you react? *OK*

22. When you have stress/pressure, how do you react?

    At home *ability to communicate is increasingly difficult*

    When you worked *same & became emotional*

    How often does it happen? *not very often now – when I was working – daily*

23. How do/did you get along with other people?

    At home *good*

    When you worked *good*

24. What do you do when someone criticizes you or tells you what to do? *welcome positive criticism – in my situation feel I need direction*

25. Is there anything else you wish to state about your mental or emotional condition and how it prevents you from working? YES [ ] NO [✓]. If YES, state it here.
    Signature of Claimant *Carolyn Cleveland* Date *9-29-94*

Form Completed By *Sheri Short*

Relationship to Claimant *daughter*

Cary A. Conaway Ph.D. 520 E. Central Park #222
Plano, TX. 75074
TEL 214/670-3104

NAME: Cleveland, Carolyn C.
DOB: 08-17-35
AGE: 59
SSN: 530-26-0461
EVALUATION DATE: 11-03-94

I. CHIEF COMPLAINT

When asked why she was at the examination, Ms. Cleveland said, "To get my disability." When asked why she had applied for disability benefits Ms. Cleveland responded, "I had a stroke in January of 1994; I went back to work but I couldn't work."

* * *

VII. PROGNOSIS

Some improvement in her current functioning is anticipated. This condition has shown steady progress and response to treatment has been favorable. Although language functions are still affected she could communicate easily. She reports that language is better if she is completely rested. She reports being well rested at the time of the evaluation.

VIII. CAPABILITY

Ms. Cleveland is considered competent to manage benefits and make financial decisions.

/s/ *Cary A. Conaway* — *11-13-94*
Cary A. Conaway, Ph.D. — Date

[Logo]
Texas
Rehabilitation
Commission
"A Human Energy Agency"

VERNON M. ARRELL
Commissioner

Dallas Northeast Field Office
6500 Greenville Ave., Suite 250
Dallas, Texas 75206

Telephone (214) 692-1665
Fax (214) 891-0841

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Carol Cleveland
1806 Serenade Lane
Richardson, Tx 75081

Dear Carol:

After reviewing all available information, it has been determined that you are ineligible for Vocational Rehabilitation Services for the following reasons:

__X__ Vocational Rehabilitation Services will not benefit you in terms of an employment outcome.

____ You do not have a physical or mental disability which results in a substantial impediment to employment.

____ Vocational Rehabilitation Services are not required.

This decision is based on information obtained from the preliminary and comprehensive assessments and is subject to appeal as explained at the time you applied for Vocational Rehabilitation Services. If you desire to arrange for an appeal, please contact me at this office for assistance. The Client Assistance Program is available should you need additional help in understanding this determination or in appealing it.

11-7-94 — /s/ *Illegible*
Date — Counselor

TEXAS REHABILITATION COMMISSION

AMENDMENT TO THE INDIVIDUALIZED WRITTEN REHABILITATION PROGRAM (IWRP) (CERTIFICATION OF INELIGIBILITY)

Client Name: *Carolyn Cleaveland* [sic]

Date: *11/7/94*

This change to your IWRP records that, based on a review of all available information, you are not able to achieve and employment outcome and; therefore, are not eligible for Vocational Rehabilitation services.

The Counselor's reason(s) for an ineligibility Determination: If the reason for case closure is disability too severe, describe the demonstration by clear and convincing evidence that the individual is not capable of achieving an employment outcome (attach additional sheets if needed):

The closure as disability too severe is based on clients request & supported by existing Medical records & counselor clinical assessment. Ms. Cleaveland [sic] *reports severe physical & cognitive limitation which will interfere with her ability to find & keep employment.*

Your (client's) opinion and/or any representative's opinion of this Determination of ineligibility (attach additional sheets if needed):

Ms. Cleaveland [sic] agrees with the assessment and would like her case to be closed.

This determination of ineligibility has been made with full participation of you and, if appropriate, your parent, guardian, or other representative.

A copy of this document was given to you on: *11/7/94* (date)

Your Rights of Appeal, including the right to an annual review of this decision, have been explained to you and you realize that the first step in appealing an ineligibility decision, after talking with your counselor, is to give your counselor the complaint in writing.

If you have questions or concerns about this decision, you may call the Texas Rehabilitation Commission's Assistance and Referral Services office (1-800-628-5115) or you may call the Client Assistance Program (1-800-223-4206).

Counselor's Signature
/s/ *Illegible*

Date:
11/7/94

Social Security Administration
Retirement, Survivors, and Disability Insurance
Notice of Disapproved Claim

Telephone: 214 767-9931

Date: NOV 30 1994

Claim Number: 530 26 0461

Carolyn Cleveland
1806 Serenade
Richardson, TX 75081

We are writing about your claim for Social Security disability benefits. Based on a review of your health problems you do not qualify for benefits on this claim. This is because you are not disabled under our rules.

* * *

Noel D. Wall, Dallas
Regional Commissioner

* * *

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Social Security Administration

EXPLANATION OF DETERMINATION

Name of Claimant	SSN	Type of Claim
Carolyn Cleveland	530-26-0461	DIB

The determination on your claim w[illegible] made by an agency of the State, Doctors and other people in the State Agency who are trained in disability evaluation reviewed the

evidence and made the determination based on Social Security law and regulations. The determination was not made by your own doctor or by other people or agencies writing reports about you. However, any evidence they gave us was used in making this determination.

The following information was used to decide your claim:

Steven Herzog, M.D., reports dated 1/11/94 to 9/20/94; Richardson Medical Center, reports dated 1/8/94; Baylor University Medical Center, reports dated 1/11/94 to 1/13/94; Malladi R. Sastry, M.D., reports dated 10/21/81 to 4/11/94; Parkside Hospital, reports dated 3/14/93 to 4/15/93; Cary A. Conaway, Ph.D., report of full battery psychological consultative examination dated 11/3/94.

We have determined that your condition is not severe enough to keep you from working. We considered the medical and other information, your age, education, training and work experience in determining how your condition affects your ability to work. You said you were disabled because of a stroke causing speech problems. However, you have made a good recovery. Reports show that you have some difficulty understanding and remembering complex instructions. Most of the time you are able to think clearly and carry out normal activities. Although you do have speech problems, you can be understood by others. The evidence does not show any other health problems that cause significant limitations. Although a return to work done in the past is not possible, your condition does allow other less demanding work. This conclusion takes into consideration your age, education, and work history. If your condition gets worse

and keeps you from working, write, call, or visit any Social Security office.

THE GANT CLINIC
9400 N. Central Expressway
Suite #1305
Dallas, Texas 75231

Bob L. Gant Ph.D.
Fellow, American Academy of Psychosomatic Medicine
Diplomate, American Board of Professional Neuropsychology
Diplomate, American Academy of Pain Management

Voice: (214) 361-6092
Fax: (214) 361-5429
Internet: GANT01@UTSW.SWMED.EDU

The following letter is strictly CONFIDENTIAL and is for the information of the person to whom it is addressed. No responsibility can be accepted if it is made available to another person, INCLUDING THE PATIENT.

January 4, 1995

Stephen Herzog, MD
712 N. Washington
Dallas, Texas

RE: Patient's Name: Carolyn Cleveland
Social Security Number: 530-26-0461

Dear Dr. Herzog,

Thank you for referring Carolyn Cleveland for neuropsychological testing and psychological treatment. The

patient's insurance company has been kind enough to pre-authorize these services and we are in the midst of the evaluation at this time. I did an intake interview with the patient today. While she is not a completely accurate historian, she did relate to me a history of some type of stroke earlier this year. It was her belief that the stroke was localized to the left hemisphere. We have taken the liberty of obtaining permission to view her medical records which will further clarify the nature of this event and the medical consequences.

Psychologically, things have been a mess. The patient was fired shortly after returning to work. Her rehabilitation counselor had offered the company assistance in accommodating her disability but, according to Ms. Cleveland, this was to no avail. The loss of her job and income have been emotionally devastating.

Observations of the patient suggest that she is suffering from an organic affective disorder. She displays word finding difficulty, emotional lability, and is easily confused. It is presumed that her altered mental status is a function of the aforementioned CVA-type event.

At this point, a full neuropsychological evaluation is contemplated. The patient has also bee [sic] approved for supportive psychotherapy sessions. I presume this is the basis for your referral and hope that we have complied

with your wishes. Thank you very much for referring this patient to us.

Best Personal Regards,

/s/ *Bob L. Gant Ph.D.*
Bob L. Gant, Ph.D. FAPM

BLG/bmh

cc: Dr. Fish

Letter has been dictated, but not proofread. Transcription variances may occur.

THE GANT CLINIC
9400 N. Central Expressway
Suite #1305
Dallas, Texas 75231

Bob L. Gant Ph.D.
Fellow, American Academy of Psychosomatic Medicine
Diplomate, American Board of Professional Neuropsychology
Diplomate, American Academy of Pain Management

Voice: (214) 361-6092
Fax: (214) 361-5429
Internet: GANT01@UTSW.SWMED.EDU

NEUROPSYCHOLOGICAL EVALUATION

Patient Name:	Carolyn Cleveland
DOB:	8-17-35
Age:	59 years
SS #:	530-26-0641
DOS:	1-9-95
Referring Physician:	Stephen Herzog, MD
Psychometrist:	Pennissi P. Taylor, M.S.
Psychologist:	Bob L. Gant, Ph.D.

IDENTIFICATION AND REFERRAL INFORMATION

Carolyn Cleveland is a fifty-nine-year old Caucasian female. Ms. Cleveland has been divorced since 1983. She was referred for a neuropsychological evaluation by Dr. Herzog due to Ms. Cleveland's report of emotional lability and severe memory difficulties. Ms. Cleveland applied for Social Security Disability but has been denied. At the current time, Carl Weisbrod is representing Ms. Cleveland in her appeal of the disability denial.

* * *

DISABILITY RATING

Based on the AMA Guide to Disability Determination, 3rd Edition, 2nd Printing (February, 1989), Ms. Cleveland would, in my estimation be classified under a marked disability rating based on my analysis of the available data. This is taken from page 241 of the guide using Table 1 in Chapter 14. Based on this evaluation, the patient is permanently disabled.

SUMMARY AND CONCLUSIONS

Carolyn Cleveland is a fifty-nine-year-old divorced Caucasian female who presented to the Gant Clinic for a neuropsychological evaluation following a stroke which occurred in January of 1994. Based on this evaluation, Ms. Cleveland is currently moderately neuropsychologically impaired. She has several significant indicators of brain

dysfunction including difficulties with abstract and psychomotor problem solving verbal and non-verbal auditory discrimination, impaired motor skills, impaired word finding and speech difficulties as well as significant verbal and figural memory problems. Ms. Cleveland has consequently become severely depressed in relation to her current situation and decreased level of functioning.

* * *

Best Personal Regards,

/s/ *Bob L. Gant, Ph.D.*
Bob L. Gant, Ph.D. FAPM
Supervising Psychologist

PT/bmh

Date of Dictation: 1-24-95, 1-25-95
Date of Transcription: 1-27-95

cc: Dr. Herzog
Dr. Fish

THE GANT CLINIC
9400 N. Central Expressway
Suite #1305
Dallas, Texas 75231

Bob L. Gant Ph.D.
Fellow, American Academy of Psychosomatic Medicine
Diplomate, American Board of Professional Neuropsychology
Diplomate, American Academy of Pain Management

Voice: (214) 361-6092
Fax: (214) 361-5429
Internet: GANT01@UTSW.SWMED.EDU

The following letter is strictly CONFIDENTIAL and is for the information of the person to whom it is addressed. No responsibility can be accepted if it is made available to another person, INCLUDING THE PATIENT.

January 23, 1995

Stephen Herzog, MD
712 NW Washington
Dallas, Texas

RE: Carolyn Cleveland
SS#: 530-26-0461

Dear Dr. Herzog,

As you know, Carolyn Cleveland is a fifty-nine-year-old Caucasian female who reportedly suffered a stroke in January of 1994. The patient was sent to me for neuropsychological testing and treatment. The neuropsychological testing has now been completed and a report will be sent to you under separate cover.

Based on our findings, the patient does appear to have suffered neuropsychological damage as a presumed result of her stroke. It is also reported that the patient has a history of alcoholism. Currently, the patient is also suffering from depression which I understand you are treating with Zoloft.

As you know, psychologically, things for the patient have been a mess. The patient was fired shortly after returning to work. The loss of her job and income have been emotionally devastating and have compounded her injury by affecting her self confidence and self esteem.

While the effects of the patient's stroke are relatively permanent, I do think that we can help her psychologically with some emotional support. I am going to recommend to the patient that she attend some psychological counseling sessions. The patient is in agreement with this.

I hope that this plan meets with your approval.

Best Personal Regards,

/s/ *Bob L. Gant, Ph.D.*
Bob L. Gant, Ph.D., FAPM

THE GANT CLINIC
9400 N. Central Expressway
Suite #1305
Dallas, Texas 75231

Bob L. Gant Ph.D.
Fellow, American Academy of Psychosomatic Medicine
Diplomate, American Board of Professional Neuropsychology
Board Certified Forensic Examiner
Fellow, American Back Society
Diplomate, International Academy of Behavioral Medicine

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The following letter is strictly CONFIDENTIAL and is for the information of the person to whom it is addressed. No responsibility can be accepted if it is made available to another person, INCLUDING THE PATIENT. Contents may also be protected by patient/doctor confidentiality law or may represent privileged attorney/client material

May 12, 1995

Dr. Steven P. Herzog
Dallas Neurological Clinic
712 North Washington, Suite 100
Dallas, Texas 75246

RE: Carolyn Cleveland

Dear Dr. Herzog,

I hope that you received our neuropsychological evaluation which was completed on 1-6-95 for Carolyn. Based on our neuropsychological evaluation, I believe this

patient is permanently and completely disabled from any productive work. She suffers significant neuropsychiatric as well as neurocognitive deficits which render he [sic] unable to be gainfully employed. I understand that her Social Security Application has been denied. This is somewhat surprising to me in that it is my understanding that Social Security utilizes results such as those obtained on the Halstead-Reitan Neuropsychological Test Battery when making their determination. It is interesting to note that I was never contacted by the disability examiner during the disability determination process, as usually is the practice. I wonder if they have been cognoscente [sic] of this lady's plight?

I am sending a copy of this letter to the patient's attorney, Carl Weisbraud [sic]. Mr. Weisbraud [sic] is one of the top Social Security attorneys in this part of the country. I am sure he will aggressively pursue assistance for this patient. I think she is in desperate need of his assistance.

The patient has been attending her therapy sessions at my clinic on a faithful basis. She is extremely depressed, and I believe she is suffering from an organic brain syndrome. We have been trying to get the patient to see a psychiatrist who specializes in treating patients with organic brain syndromes, Dr. Jay Seastrunk. I trust this plan meets with your approval.

Thank you for allowing us to participate in this patient's care.

Best Personal Regards,

Bob L. Gant, Ph.D., FAPM

BLG/bmh

cc: Carl Weisbraud
Carolyn Cleveland
Jay Seastrunk

Letter has been dictated, but not proofread.
Transcription variances may occur.

REQUEST FOR RECONSIDERATION

* * *

NAME OF CLAIMANT
Carolyn C Cleveland

SOCIAL SECURITY CLAIM NUMBER
530-26-0461

SPOUSE'S NAME (*Complete ONLY in SSI cases*)

CLAIM FOR (*Specify type, e.g., retirement, disability, hospital insurance, SSI, etc.)*
disability

* * *

I do not agree with the determination made on the above claim and request reconsideration. My reasons are:

I am unable to work due to my disability.

* * *

SIGNATURE OR NAME OF CLAIMANT'S REPRESENTATIVE
/s/ *Carl Weisbrod*
Carl Weisbrod
[ ] NON-ATTORNEY
[X] ATTORNEY

STREET ADDRESS
P.O. Box 821329

CITY	STATE	ZIP CODE
Dallas	TX	75382

TELEPHONE NUMBER *(include area code)*
(214) 373-3761

DATE
01/09/95

CLAIMANT SIGNATURE
/s/ *Carolyn Cleveland*

STREET ADDRESS
1806 Serenade

CITY	STATE	ZIP CODE
Richardson	*Tx*	*75081*

TELEPHONE NUMBER *(Include area code)*
(214) 238-9150

DATE
01/09/95

* * *

QUESTIONS FOR:
B. MOODLEY, VOCATIONAL COUNSELOR
RE: CAROLYN CLEVELAND SSN: 530-26-0461

Instructions: In answering the following questions, please base your answers on your education, experience, training, and Ms. Cleveland's medical and vocational history as obtained by you through interviews, vocational testing and medical records.

---

(1) Please provide your full name and address.

Bobby M. Moodley, Phd, LPC, CRC,

(2) Please provide your professional qualifications or attach a current resume.

Senior Counselor with Texas Rehabilitation Commission. Phd., Licensed Professional Counsel or (LPC), Certified Rehab. Counsel or (CRC)

(3) Did you interview Ms. Cleveland as an applicant for vocational services?

[✓] Yes.

[ ] No.

(4) When did you interview Ms. Cleveland?

June 7, 1994

(5) Did you assess her physical and mental ability in order to determine whether or not Ms. Cleveland would be able to successfully engage in gainful employment?

[✓] Yes.

[ ] No.

(6) What method(s) did you utilize in order to arrive at your decision?

(1) *Medical & Psychiatric & Vocational Records.*
(2) *Clinical Assessment.*
(3) *Clients self report.*

(7) In your opinion, is Ms. Cleveland a candidate for vocational training for future successful employment?

[ ] Yes.

[✓] No.

(8) If not, what conditions or symptoms interfere with Ms. Cleveland's ability to function properly in an employment setting?

Clients [sic] *has cognitive impairments and medical problems which may interfere with this clients ability to participate in competitive employment especially in employment in which she has done for over 30 yrs.*

2/10/95
Date

/s/ *B. Moodley*
B. MOODLEY
Vocational Counselor

Social Security
Notice of Reconsideration

From: Department of Health and Human Services
Social Security Administration

Date: APR 17 1995

Carolyn Cleveland
1806 Serenade
Richardson, TX 75081

Claim Number: 530-26-0461
Claim for
[X] Disability Insurance Benefits

* * *

Upon receipt of your request for reconsideration we had your claim independently reviewed by a physician and disability examiner in the State agency which works with us in making disability determinations. The evidence in your case has been thoroughly evaluated; this includes the medical evidence and the additional information received since the original decision. We find that the previous determination denying your claim was proper under the law. Attached to this notice is an explanation of the decision we made on your claim and how we arrived at it. The reverse of this notice identifies the legal requirements for your type of claim.

* * *

Noel D. Wall
Dallas Regional Commissioner

EXPLANATION OF DETERMINATION

Name of Claimant	SSN	Type of Claim
Carolyn Cleveland	530-26-0461	DI

* * *

In addition to the information used in your prior determination, the following medical information was used to decide this reconsideration claim:

Bob L. Gant, Ph.D., report of 1-9-95; Bob Moodley, P.D., report of 2-10-95; Mark A. Hardin, M.D., records 8-23-94 to 2-24-95.

We were unable to obtain additional reports; however, we had enough information to evaluate your condition. We have determined that your condition is not severe enough to keep you from working. We considered the medical and other information, your age, education, training and work experience in determining how your condition affects your ability to work. You said you were disabled because of residuals of a stroke. Reports show that you have some difficulty with memory. However, your current symptoms are not severe enough to be considered disabling under Social Security guidelines. Although a return to work done in the past is not possible, your condition does allow other less demanding work. This conclusion takes into consideration your age, education, and work history. If your condition gets worse and keeps you from working, write, call, or visit any Social Security office.

* * *

REQUEST FOR HEARING BY ADMINISTRATIVE LAW JUDGE

1. CLAIMANT
   Carolyn C Cleveland

3. SOC. SEC. CLAIM NUMBER
   530-26-0461

5. I REQUEST A HEARING BEFORE AN ADMINISTRATIVE LAW JUDGE. I disagree with the determination made on my claim because.

   I am unable to work due to my disability.

* * *

6. Check one of these blocks.

   [X] I have no additional evidence to submit at this time

* * *

[You should complete No. 8 and your representative (if any) should complete No. 9. If you are represented and your representative is not available to complete this form, you should also print his or her name, address, etc. in No. 9.]

8. *Carolyn Cleveland*

* * *

Date 05/09/95

(REPRESENTATIVE'S SIGNATURE/NAME)
/s/ Carl Weisbrod

* * *

Date 05/09/95

* * *

MEDICAL SOURCE STATEMENT
About What the Claimant Can Still Do
Despite Impairment(s)

Name: *Carolyn Cleveland* SSN: *530-26-0461*

INSTRUCTIONS: Please complete the following assessment based on your clinical evaluation and test findings. You are not required to perform any special test of functional capacity to render your opinions on this form.

Please mark the activities the patient CAN perform on a sustained basis. "On a sustained basis" is defined as 40 hours per regular work week less a reasonable time daily for breaks.

A. Stand and/or walk:

(1) CONTINUOUSLY before alternating postures sitting or lying down:
(Circle one please)

<15 min 15 min 30 min 1 hr 2 hrs 3 hrs
4 hrs 5 hrs 6 hrs 7 hrs 8 hrs

(2) TOTAL during an 8-hour workday: (Circle one please)

<15 min 15 min *30 min* 1 hr 2 hrs 3 hrs
4 hrs 5 hrs 6 hrs 7 hrs 8 hrs

B. Sit, (i.e., at a table or bench without opportunity to recline, elevate the legs, etc.)

(1) CONTINUOUSLY before alternating postures standing or lying down: (Circle one please)

<15 min *15 min* 30 min 1 hr 2 hrs 3 hrs
4 hrs 5 hrs 6 hrs 7 hrs 8 hrs

(2) TOTAL during an 8-hour workday: (Circle one please)

<15 min 15 min 30 min *1 hr* 2 hrs 3 hrs
4 hrs 5 hrs 6 hrs *7 hrs* 8 hrs

C. Lying down (i.e. resting in supine posture)
Can it reasonably be expected that this individual will require rest lying down during an 8 hour workday for pain management and/or fatigue?

[ ] Yes, for pain management

[X] Yes, due to fatigue

[ ] No

D. Lift (including upward pulling) and/or carry:

	Constantly (≥2/3 of 8 hrs)	Frequently (1/3-2/3 of 8 hrs)	Occasionally (<1/3 of 8 hrs)	None (no sustained/ 8 hrs)
Weight in Pounds				
Up - 5 lbs.	____	____	X	____
6 - 10 lbs.	____	____	X	____
11 - 20 lbs.	____	____	____	X
21 - 50 lbs.	____	____	____	X
51 - 100 lbs.	____	____	____	X

F. Repetitive use of arm: (Complete each subsection).

	Constantly (≥2/3 of 8 hrs)	Frequently (1/3-2/3 of 8 hrs)	Occasionally (<1/3 of 8 hrs)	None (no sustained/ 8 hrs)
Reaching with RIGHT arm.	____	____	X	____
Reaching with LEFT arm.	____	____	____	X

Grasping with RIGHT hand.	____	____	X	____
Grasping with LEFT hand.	____	____	____	X
Fingering with RIGHT hand.	____	____	X	____
Fingering with LEFT hand.	____	____	____	X

G. Period of Restriction:

Has the patient's condition existed and persisted with the restrictions as outlined in this Medical Source Statement at least since *January, 1994?*

[X] Yes [ ] No

If not, state the first date the patient's condition existed and persisted with such restrictions:

_____, 19__

H. Diagnoses: This assessment is premised upon my diagnoses of:

CVA L HEMIPARESIS

CERTIFICATION

By my signature appended hereto, I attest that I have answered truthfully and accurately to the best of my ability, each of the questions prestated in this Medical Source Statement.

Dated *7/6/95*, 199__.

/s/ *Leslie D. Porter, MD*
Leslie D. Porter, MD
Medical Director
Baylor Institute for Rehabilitation

_____

NOTE TO PROCESSING CENTER
FURTHER ACTION NECESSARY

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

CLAIM FOR

IN THE CASE OF

Carolyn C. Cleveland
(Claimant)

_____
(Wage Earner)

Period of Disability, Disability Insurance Benefits, and Supplemental Security Income

_____

530-26-0461
(Social Security Number)

This case is before the undersigned on a timely request for a hearing filed by the claimant, who is dissatisfied with the determinations denying her applications for a period of disability, disability insurance benefits, and supplemental security income benefits.

Based on the evidence of record, the undersigned finds that the claimant has the limitations as identified in the attached document incorporated herein by reference. Given these findings of fact, the undersigned has concluded that the claimant became disabled on January 7, 1994, and continues to be disabled through the date of this decision.

IT IS THE DECISION OF THE ADMINISTRATIVE LAW JUDGE that, based on the application for disability insurance benefits dated January 28, 1994 (with protective filing date of January 11, 1994), the claimant is entitled to a period of disability commencing January 7, 1994 and to disability insurance benefits, pursuant to the Social Security Act and the regulations promulgated thereto.

IT IS THE FURTHER DECISION OF THE UNDERSIGNED that the claimant has been disabled at all times from the current supplemental security income filing date of January 28, 1994 (with protective filing date of January 11, 1994), through the date of this decision.

The claimant is eligible for supplemental security income benefits *if and to the extent* the nondisability requirements therefor have been met. This case is remanded to the appropriate unit of the Social Security Administration for investigation of the nondisability factors. Once that investigation has been completed, the Administration shall advise the claimant whether she is eligible for supplemental security income payments and, if so, the amount and the month(s) for which benefits will be paid.

/s/ *Harold G. Adams*
HAROLD G. ADAMS
Administrative Law Judge

29 SEP 1995
Date

DECISIONAL FINDINGS OF FACT

Name: Carolyn C Cleveland SSN: 530-26-0461

Claim Type: SSDC

Primary Disabling Impairment (Diagnosis):
Status Post
Cerebrovascular Accident

Meets Listing:
Yes [ ] No [X] Listing Number [ ]

Equals Listing:
Yes [ ] No [X] Listing Number [ ]

RESTRICTIONS (Place an "X" before each applicable restriction)

Physical

[X] Walking	[X] Reaching
[X] Standing	[X] Carrying
[X] Sitting	[X] Handling
[X] Lifting	[ ] Seeing
[X] Pushing	[X] Hearing
[X] Pulling	[X] Speaking
[ ] Other: _____	

Mental

[X] Understand, carry out, & remember simple instructions

[X] Use of Judgement

[ ] Respond appropriately to supervision, co-workers, and usual work situations

[X] Deal with changes in routine work settings

[ ] Other: _____

* * *

CURRENT PHYSICAL RESIDUAL FUNCTIONAL CAPACITY (RFC)

JOB CLASSIFICATION	Complete Range	Wide Range	Limited Range
Very Heavy	____	____	____
Heavy	____	____	____
Medium	____	____	____
Light	____	X	____
Sedentary	____	____	____
Below Sedentary	____	____	____

MEDICAL-VOCATIONAL RULES

a. Age: 58 DOB: August 17, 1935

[ ] Younger
[ ] Closely Approaching Advanced Age
[X] Advanced Age

b. Education

[ ] Illiterate
[ ] Marginal
[ ] Limited
[X] High School & Above
[ ] Inability to communicate in English

c. Occupation

[ ] Unskilled
[X] Semi-Skilled

[ ] Skilled
[X] Non-transferable
[ ] Transferable

Combination of Impairments/
Non-exertional factors

Rule 202.06 Framework Yes [ ] No [X]

Special Medical Re-examination Diary Instructions (If Applicable)

Drug Addiction/Alcoholism Sanctions
Yes [ ] No [X]

Capability Development Needed
Yes [ ] No [X]

Comments:

/s/ Harold G. Adams
HAROLD G. ADAMS
Administrative Law Judge

OHA PSYCHIATRIC REVIEW TECHNIQUE FORM

NAME: Carolyn C Cleveland SSN: 530-26-0461

Assessment is for:
Other: January 7, 1994 to present

Administrative Law Judge's Signature — Date
/s/ *Harold G. Adams* — 29 SEP 1995

I. MEDICAL SUMMARY

A. Medical Disposition(s):
RFC Assessment Necessary (i.e., a severe impairment is present which does not meet or equal a listed impairment)

B. Based Upon Category(ies): 12.02, 12.04

II. Reviewer's Notes (Does not apply to OHA)

III. DOCUMENTATION OF FACTORS THAT EVIDENCE THE DISORDER (Evaluation of the existence of a sign or symptom CLUSTER or SYNDROME for the Listed Disorder.)

PRESENT	ABSENT			
[x]	[ ]	A.	12.02	Organic Mental Disorders
[ ]	[x]	B.	12.03	Schizophrenic, Paranoid and other Psychotic Disorders
[x]	[ ]	C.	12.04	Affective Disorders
[ ]	[x]	D.	12.05	Mental Retardation and Autism
[ ]	[x]	E.	12.06	Anxiety Related Disorders
[ ]	[x]	F.	12.07	Somatoform Disorders
[ ]	[x]	G.	12.08	Personality Disorders
[ ]	[x]	H.	12.09	Substance Addiction Disorders

A. **12.02 Organic Mental Disorders** – Psychological or behavioral abnormalities associated with a dysfunction of the brain . . . as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [ ] [x] [ ] Disorientation to time and place
2. [x] [ ] [ ] Memory Impairment
3. [ ] [ ] [ ] Perceptual or thinking disturbances
4. [ ] [ ] [ ] Change in personality
5. [ ] [ ] [ ] Disturbance in mood
6. [x] [ ] [ ] Emotional Mobility and impairment in impulse control
7. [ ] [ ] [ ] Loss of measured intellectual ability of at least 15 I.Q. points from premorbid levels or overall impairment index clearly within the severely impaired range on neuropsychological testing, e.g., the Luria-Nebraska, Halstead-Reitan, etc.
8. [ ] [ ] [ ] Other

C. **12.04 Affective Disorders** – Disturbance of mood, accompanied by a full or partial manic or depressive syndrome, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [x] [ ] [ ] Depressive syndrome characterized by at least four of the following:

   a. [ ] Anhedonia or pervasive loss of interest in almost all activites, or

b. [ ] Appetite disturbance with change in weight, or

c. [ ] Sleep disturbance, or

d. [x] Psychomotor agitation or retardation, or

e. [x] Decreased energy, or

f. [ ] Feelings of guilt or worthlessness, or

g. [x] Difficulty concentrating or thinking, or

h. [x] Thoughts of suicide, or

i. [ ] Hallucinations, delusions or paranoid thinking

2.[ ] [ ] [ ] Manic syndrome characterized by at least three of the following:

a. [ ] Hyperactivity, or

b. [ ] Pressures of speech, or

c. [ ] Flight of ideas, or

d. [ ] Inflated self-esteem, or

e. [ ] Decreased need for sleep, or

f. [ ] Easy distractibility, or

g. [ ] Involvement in activities that have a high probability of painful consequences which are not recognized, or

h. [ ] Hallucinations, delusions or paranoid thinking

3. [ ] [ ] [ ] Bipolar syndrome with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive syndromes (and currently

characterized by either or both syndromes)

4. [x] [ ] [ ] Other: Organic Mood Disorder

IV. RATING OF IMPAIRMENT SEVERITY

A. "B" CRITERIA OF THE LISTINGS

THE FOLLOWING FUNCTIONAL LIMITATIONS (WHICH APPLY TO PARAGRAPH B OF LISTINGS 12.02-12.04 AND 12.06-12.08 AND PARAGRAPH D OF 12.05) EXIST AS A RESULT OF THE INDIVIDUAL'S MENTAL DISORDER(S).

NOTE: ITEMS 3 AND 4 BELOW ARE MORE THAN MEASURES OF FREQUENCY. DURATION AND EFFECTS OF THE DEFICIENCIES (ITEM 3) OR EPISODES (ITEM 4) ARE DISCUSSED IN THE DECISION.

Listing(s) under which the items below are being rated: 12.02, 12.04

FUNCTIONAL LIMITATION AND DEGREE OF LIMITATION

1. Restrictions of Activities of Daily Living:

None[ ] Slight[ ] Moderate[x]
Marked*[ ] Extreme[ ] Insuff Evid[ ]

2. Difficulties in Maintaining Social Functioning:

None[ ] Slight[ ] Moderate[x]
Marked*[ ] Extreme[ ] Insuff Evid[ ]

3. Deficiencies of Concentration, Persistence or Pace Resulting in Failure to Complete Tasks in a Timely Manner (in work settings or elsewhere):

Never[ ] Seldom[ ] Often[ ]
Frequent*[X] Constant[ ] Insuff Evid[ ]

---

4. Episodes of Deterioration or Decompensation in Work or Work-Like Settings Which Cause the individual to Withdraw from that Situation to Experience Exacerbation of Signs and Symptoms (which may Include Deterioration of Adaptive Behaviors):

Never[ ] Once/Twice[x] Repeated*(3+)[ ]
Continual[ ] Insuff. Evid[ ]

---

*Degree of limitation that satisfies the Listings: Extreme, Constant and Continual also satisfy that requirement.

B. Summary of Functional Limitation Rating for "B" Criteria

NO. OF FUNCTIONAL LIMITATIONS MANIFESTED AT THE LISTING LEVEL: [1] (The number must be at least 2 to satisfy the requirements of paragraph B in Listings 12.02, 12.03, 12.04 and 12.06 and paragraph D in 12.05; and at least 3 to satisfy the requirements in paragraph B in Listings 12.07 and 12.08.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CAROLYN C. CLEVELAND	)	
v.	)	
POLICY MANAGEMENT SYSTEMS CORPORATION, GENERAL INFORMATION SERVICES, A DIVISION OF POLICY MANAGEMENT SYSTEMS CORPORATION and CYBERTEK CORPORATION	)	CIVIL ACTION NO. 3:95-CV-2140-H

AFFIDAVIT OF CAROLYN C. CLEVELAND

BEFORE ME, the undersigned authority, on this day personally appeared Carolyn C. Cleveland, who is known to me and, who after being duly sworn, deposed as follows:

"My name is Carolyn C. Cleveland. I am over the age of 21 years of age, am of sound mind and am in all ways competent to make this oath. All of the matters expressed herein are true and correct and are of my personal knowledge. I am the Plaintiff in the above-styled case. I was employed by the Defendant, Policy Management Systems Corporation ("PMSC").

I began my employment with PMSC in approximately August 1993. I was hired by Anthony Clark, a manager, with the understanding that if the company received the pending contract from the post office, I would supervise the night shift. In the beginning, I was assisting with insurance

investigations which the company had fallen behind on. Mr. Clark had me assisting the reporters and also assisting Judy Threadgill, an investigator, with her regular reports. When the company acquired the contract, Mr. Clark told me he would prefer it if I continued assisting the reporters. Clark told me it would take a long time to find someone with my qualifications to replace me. Mr. Clark told me he was pleased with my work and complimented me on my attitude.

In approximately December 1993, I began receiving my own reports. I was however placed in a cubicle with three noisy co-workers which made it difficult to concentrate. I complained to my supervisor Debra Levine, but she said there was nothing she could do. On January 7, 1994, I complained again, and Levine said I could move to the credit machine area. I moved by belongings and that day I had a stroke while on the job. The following Monday, one of my daughters, called Levine to tell her I had a stroke and would not be coming to work. It was my understanding from my daughter that Levine said I should come into work. During the time I was off as a result of the stroke, Levine and Clark kept calling me pressuring me back to work.

Dr. Herzog was my treating physician for my stroke. The stroke effected [sic] my ability to speak and to concentrate. For [sic] period of time after the stroke, I could not talk. Also, I could not read or dial a phone, and I had trouble understanding most of what was said to me. I was very frightened and felt helpless. The stroke also effected [sic] my memory. I can remember things sometimes and other times I cannot

remember things. As I understand it from my doctors, this condition is called aphasia and it is essentially a problem with memory in that sometimes I can remember names or places and other times I cannot remember. I went through speech rehabilitation after my stroke and by April 1994, I was able to speak fairly well. I worked extremely hard in rehab to recover by following my doctor's instruction. (Please also see the Affidavit of Dr. Herzog attached to Plaintiff's Amended Response to Defendant's Motion for Partial Summary Judgment).

In approximately January 1994, after I had my stroke, one of my daughters, filed a claim for social security disability benefits on my behalf. Although I apparently signed the social security disability application which was initially filed, my daughter initiated the filing of the claim and filled out the paperwork. I do not specifically recall signing the social security application in January 1994. In approximately April 1994, I was released to return to work. My physical condition had improved between January 1994 and April 1994. During the time between my return to work and my termination, I did not pursue social security benefits. Shortly after I returned to work, I contacted the Social Security Administration and informed them that I was returning to work and did not need social security disability benefits. I contacted the Social Security Administration because I received some paperwork from them, and I wanted them to know I was working and would not need benefits. I returned to work at PMSC in April 1994 on a part-time basis. I worked part-time for about two weeks and then started working full time. I was fearful about returning to work, but

Clark and Levine said they would help me and would provide another job if necessary.

As I was not fully recovered from the stroke, I was having a difficult time with the increased workload. I had started getting regular reports in December 1993, but then I had the stroke on January 7, 1994. Prior to my stroke I was given very little training on the reports. When I returned to work after the stroke, I was given no additional training or help, even though I asked for the training I had not received. For instance, I asked for computer training, but was denied this by Debra Levine so I had to keep doing my reports on a typewriter.I also tried taking work home to try and catch up, but Debra Levine forbid [sic] me to do this. In dealing with me at work, I observed that Debra Levine acted as if she did not believe that I was having problems such as aphasia. In response to Levine's treatment of me, I informed Levine that Dr. Moodly, with the Texas Rehabilitation Commission, offered to send someone through the Texas Rehabilitation Commission to assist me free of charge, and offered to talk with my employer and explain aphasia. Debra Levine's response to my statements regarding Dr. Moodly's offers of assistance, was that I could not have help and that she would not talk to Dr. Moodly.

Also, Levine and my co-workers would make cruel remarks, mimic me and laughed at my speech problems. Negative remarks were made about my work by Levine. In an effort to do a good job, I kept asking Levine for help and explanations, but she would just put me off. On several occasions, I asked for a transfer to a position which would have been easier on me,

but was denied by Debra Levine, my supervisor. I was treated like trash by Levine and my co-workers in that they mocked me and belittled my medical condition by sarcastically mimicking my speech impediment which I developed after the stroke. On June 3, 1994 Levine gave me a written warning alleging poor performance.

After the written warning I doubled my efforts to produce quality work. The day or two before my termination, I had been encouraged because I was finally getting some assistance from Jean Holbert, an investigator, with using the computer. Also, Sharon Russell, an inspector, gave me training to interpret the credit reports. Russell also helped me with the criminal reports. I was feeling good because for so long I had been trying to get training and assistance and each time I would go to Debra Levine she would not help. Levine would claim to be too busy or would say she would help me later, but she did not help. I felt positive about my job performance, and I was crushed emotionally when I was terminated. I felt like I had climbed a high mountain and was kicked off just as I was getting near the top. (For additional details, see also the Affidavit of Dr. Herzog attached to Plaintiff's Amended Response to Defendant's Motion for Partial Summary Judgment).

On or about July 14, 1994, I was told by Peter Moore, the Regional Vice President, and Debra Levine that I was terminated. I was told I was being terminated because of poor job performance.

In response to being told of my termination, I begged Peter Moore to let me keep my job or move to another job. Moore told me that his

father had a stroke and has not been able to do anything since then and that I would not be able to do anything either. Also, Mr. Moore told me that I would not be able to afford to continue my insurance.

During my initial termination meeting, Moore agreed to review my work. The next day, Moore again told me I was terminated.

As a result of my termination in July 1994, I was devastated emotionally. I became depressed as a result of the humiliating way I was treated and terminated by PMSC. My aphasia became worse after my termination. After my termination, my physical condition became worse and I began to feel like I could not do anything. I was fatigued and depressed. This was the reason I filed for social security benefits after my termination. I began seeing a psychologist, Dr. Gant, in approximately December 1994 because of my depression and worsening condition. I was granted social security benefits in approximately November/December 1995.

FURTHER AFFIANT SAYETH NOT.

/s/ *Carolyn C. Cleveland*
Carolyn C. Cleveland

SWORN TO AND SUBSCRIBED before me this *6th* day of *August*, 1996.

/s/ *Daion Christenson*
Notary Public in and
for the State of Texas
[SEAL] DAION M. CHRISTENSON
MY COMMISSION EXPIRES
JULY 3, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CAROLYN C. CLEVELAND	)	
v.	)	
POLICY MANAGEMENT SYSTEMS CORPORATION, GENERAL INFORMATION SERVICES, A DIVISION OF POLICY MANAGEMENT SYSTEMS CORPORATION and CYBERTEK CORPORATION	)	CIVIL ACTION NO. 3:95-CV-2140-H

AFFIDAVIT OF STEVEN P. HERZOG, M.D.

BEFORE ME, the undersigned authority, on this day personally appeared STEVEN P. HERZOG, M.D., who is known to me and, who after being duly sworn, deposed as follows:

"My name is Steven P. Herzog, M.D. I am over the age of 21 years of age, am of sound mind and am in all ways competent to make this oath. All of the matters expressed herein are true and correct and are of my personal knowledge.

I am a medical doctor licensed to practice medicine in the State of Texas. I am a Board Certified Neurologist. I am employed with the Dallas Neurological Clinic. A true and correct copy of my curriculum vitae is attached hereto.

From approximately January 11, 1994 to the present I have been Carolyn C. Cleveland's treating physician for the stroke she suffered on or about January 7, 1994. Specifically, in January

1994, I diagnosed Ms. Cleveland has having a post cerebral vascular accident (stroke) in the left cerebrum with resultant damage to the language center. The stroke left Ms. Cleveland with an aphasia. An aphasia is a disorder of input and output of language which affects one's reading ability, calculation ability, understanding and processing of all language function.

From January 1994 to April 1994, Ms. Cleveland showed significant progress in her recovery from her stroke. (It sometimes takes 6-12 months to recover fully from a stroke.) I released Ms. Cleveland to return to work in April 1994 on a part-time basis. At that time, I felt that Ms. Cleveland's prognosis was positive for continued improvement, and I felt that she would eventually reach a near 100% recovery.

After approximately two weeks on the job, Ms. Cleveland's employer requested that I release her to return to work full-time. I continued to treat Ms. Cleveland and monitor her progress after she returned to work. Ms. Cleveland, however, encountered difficulties in her performing her job including a lack of training, memory problems, time pressures and communication problems.

Prior to Ms. Cleveland's termination on July 15, 1994, the problems related to Ms. Cleveland's stroke were significantly decreasing, and she was able to communicate more easily. Ms. Cleveland's spelling had improved, even with difficult words. Ms. Cleveland was experiencing few problems with aphasia, but still needed some additional time to recover fully from her stroke. Prior to Ms. Cleveland's termination, I

had anticipated that Ms. Cleveland would ultimately reach a near 100% recovery.

After Ms. Cleveland was terminated she became depressed and her aphasia became worse. It was not until Ms. Cleveland was terminated, that she suffered this set back in her recovery.

In December 1994, I became concerned that Ms. Cleveland was having both emotional and neuropsychological problems secondary to her stroke and the depression over her termination. I referred Ms. Cleveland to Dr. Gant for a psychological analysis and treatment.

It is my opinion and belief based on a reasonable degree of medical probability and a review of Ms. Cleveland's symptoms and situation that Ms. Cleveland became depressed as a result of her termination and that her depression over her termination caused her aphasia to worsen. It is my opinion that had Ms. Cleveland been given training, time and assistance on the job, instead of being terminated, she would have continued to recover from the stroke. With time, understanding and therapy Ms. Cleveland has slowly begun to recover from the post-termination relapse of her aphasia and depression. Ms. Cleveland's current prognosis is good.

The statements in this affidavit are based on my review of Ms. Cleveland's symptoms, her situation and the history obtained from her, as well as a reasonable degree of medical probability.

FURTHER AFFIANT SAYETH NOT.

/s/ *Steven P. Herzog*
Steven P. Herzog, M.D.

SWORN TO AND SUBSCRIBED before me this *17th* day of *July*, 1996.

/s/ *Marie Yvette Boothe*
Notary Public in and
for the State of
Texas
[SEAL] MARIE YETTE BOOTHE
MY COMMISSION EXPIRES
AUGUST 19, 1997

CURRICULUM VITAE

STEVEN P. HERZOG, M. D.

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Postgraduate Education 1981-1985	University of Arizona College of Medicine Graduating Class of 1985, Degree-Medical Doctor.
Professional Education 1985-1986	General Medicine Internship, Tulane University Affiliated Charity Hospital, New Orleans, Louisiana.
1986-1988	Resident in Neurology, University of Texas Southwestern Medical Center at Dallas, Parkland Memorial Hospital.
1988-1989	Chief Resident in Neurology, University of Texas Southwestern Medical Center at Dallas, Parkland Memorial Hospital.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CAROLYN C. CLEVELAND	)	
	)	
v.	)	
POLICY MANAGEMENT	)	
SYSTEMS	)	CIVIL ACTION NO.
CORPORATION, GENERAL	)	3:95-CV-2140-H
INFORMATION SERVICES, A	)	
DIVISION OF POLICY	)	
MANAGEMENT SYSTEMS	)	
CORPORATION and	)	
CYBERTEK CORPORATION	)	

AFFIDAVIT OF SHERI SHORT

BEFORE ME, the undersigned authority, on this day personally appeared Sheri Short, who is known to me and, who after being duly sworn, deposed as follows:

"My name is Sheri Short. I am over the age of 21 years of age, am of sound mind and am in all ways competent to make this oath. All of the matters expressed herein are true and correct and are of my personal knowledge. I am the daughter of Carolyn Cleveland, the Plaintiff in the above-styled case. I am presently employed by Esmore, a private corrections corporation. I was previously employed by Tarrant County Adult Probation Department for approximately 14 years.

On or about Saturday, January 8, 1994, I took my mother, Carolyn Cleveland, to the hospital. My mother was admitted to the hospital for treatment for a stroke she had suffered.

After my mother's stroke, I assisted her with her personal business such as the bills and insurance. Shortly after the stroke, I observed problems my mother was experiencing with communication, comprehension and memory. I was concerned about my mother and worried about what would happen if she did not recover. My response to a crisis situation is to prepare for the worst case scenario, so I obtained an application for food stamps, information from HUD, and an application for social security disability benefits from the Social Security Administration. While working for the government for so many years, I observed that it often took a long time to process paperwork; therefore, I requested these applications quickly in the event my mother would need benefits. I filled in information on the social security disability application. I then gave the application to my mother to sign, and I observed her sign the application. The application was dated 1-21-94. I then filed the claim for social security disability benefits for my mother. I took my mother to therapy, and I observed that she was recovering quickly from the stroke. I observed my mother's speech and ability to communicate improve, as well as her memory and comprehension.

After my mother was terminated in July 1994, I observed the following behavior in my mother: she acted more depressed, she appeared fatigued, she would often cry when I spoke to her. I have spoken to my mother approximately every day since she had the stroke and have personally observed her physical and emotional condition. I observed the physical and emotional changes she went through after the stroke, after her return to work and after her

termination. My mother appeared emotionally devastated after the termination.

FURTHER AFFIANT SAYETH NOT.

/s/ *Sheri Short*
Sheri Short

SWORN TO AND SUBSCRIBED before me this *8th* day of *August*, 1996.

/s/ *Daion Christenson*
Notary Public in and
for the State of
Texas

[SEAL] DAION M. CHRISTENSON
MY COMMISSION EXPIRES
JULY 3, 2000

Supreme Court, U.S.
FILED
DEC 3 1998
CLERK

(4)

No. 97-1008

In The

Supreme Court of the United States

October Term, 1998

CAROLYN C. CLEVELAND,

Petitioner,

v.

POLICY MANAGEMENT SYSTEMS CORP.; GENERAL INFORMATION SERVICES, a Division of Policy Management Systems Corporation; and CYBERTEK CORP.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq.

2. If it does not create such a presumption, what weight, if any, should be given to the application for, or receipt of, disability insurance benefits when a person asserts she is a "qualified individual with a disability" under the ADA?

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I. The application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, *does not* create a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq 19

II. The weight to be given statements made in connection with an application for disability benefits should be no different than the weight given to any other evidence, i.e., the weight the factfinder determines is appropriate 19

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BRIEF FOR PETITIONER

Petitioner, Carolyn C. Cleveland, respectfully requests that the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on August 14, 1997, affirming the District Court below, be reversed and that this case be remanded to the District Court for trial on the merits.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 120 F.3d 513 (5th Cir. 1997), affirmed the decision of the United States District Court for the Northern District of Texas, which granted summary judgment in favor of the Respondents. The Fifth Circuit's August 14, 1997 Opinion is printed at Appendix A to the Petition for a Writ of Certiorari. The District Court's September 6, 1996 Judgment is printed at Appendix B to the Petition for a Writ of Certiorari. The Fifth Circuit's September 15, 1997 Order denying Petitioner's Petition for Rehearing is printed at Appendix C to the Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the Fifth Circuit was entered on August 14, 1997. Petitioner timely filed a petition for rehearing which was denied on September 15, 1997. The Petition for a Writ of Certiorari was timely filed on

December 15, 1997. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1993).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations applicable to this case are:

Americans With Disabilities Act of 1990:

General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and or other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a).

Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having an impairment. 42 U.S.C. § 12102(2).

Qualified Individual with a Disability

The term "qualified persons with a disability" means an individual with a disability who, with

or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8).

Social Security Act:

Disability

The term "disability" means – inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d)(1)(A).

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country. 42 U.S.C. § 423(d)(2)(A).

Evaluation of a Disability in General (Social Security Administration Regulations)

If you are working. If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education and work experience. 20 C.F.R. § 404.1520(b).

You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment. 20 C.F.R. § 404.1520(c).

When your impairment(s) meets or equals a listed impairment in Appendix 1. If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education and work experience. 20 C.F.R. § 404.1520(d).

Your impairment(s) must prevent you from doing past relevant work. If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled. 20 C.F.R. § 404.1520(e).

Your impairment(s) must prevent you from doing any other work. (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education and past work experience to see if you can do other work. If you cannot, we will find you disabled. (2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule. 20 C.F.R. § 404.1520(f).

STATEMENT OF THE CASE

Cleveland's Disability

On January 7, 1994, during the course and scope of her employment with Policy Management Systems Corporation ("PMSC"), Carolyn Cleveland suffered a stroke. (J. App. 94).[1]

Steven Herzog, M.D. provided medical treatment to Cleveland in connection with her stroke. (J. App. 94, 99). As a result of the stroke, Cleveland suffered a condition known as aphasia. (J. App. 100). Aphasia is a disorder involving the cognitive input and output of language. (J. App. 100). Aphasia impairs memory, reading ability, calculation ability and the understanding and processing of all human language function. (J. App. 100).

Consistent with stroke-induced aphasia, Cleveland's memory was impaired, as well as her ability to speak and

[1] "J. App." refers to the Joint Appendix in this case.

to concentrate. (J. App. 94). In fact, for a period of time after the stroke, Cleveland could not speak at all. (J. App. 94). Additionally, Cleveland was unable to read or dial a phone, and had trouble understanding most of what was said to her. (J. App. 94).

The Initial Application for Social Security Disability Benefits

After observing Cleveland's difficulty with communication, comprehension and memory, Cleveland's daughter, Sheri Short, became concerned about her mother's condition. (J. App. 105). As a result, in January 1994, Short obtained an application for social security disability benefits.[2] (J. App. 105). Short completed the application and her mother signed it on January 21, 1994. (J. App. 105). Short then submitted the application to the Social Security Administration ("SSA") for her mother. (J. App. 105). Due to Cleveland's debilitated condition in January 1994, Cleveland neither recalls her daughter filing this application nor signing the form. (J. App. 95).

This initial application was followed by a "Supplemental Questionnaire" dated March 16, 1994, signed by Cleveland. (J. App. 31). In this document, Cleveland described her symptoms and limitations as they existed at the time, i.e., only two months after the stroke. (J. App. 31-36). Cleveland had not been released to return to work

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[2] Short had previously worked for the Tarrant County Adult Probation Department for approximately 14 years, and had observed that the processing of government paperwork was often a slow process. Therefore, Short requested the social security application quickly in the event her mother would need benefits. (J. App. 105).

at that time, and as indicated on the form, had not returned to work. (J. App. 36, 95, 100).

Cleveland's Efforts to Return to Work Despite Her Disability

After suffering the stroke, Cleveland diligently pursued recovery. (J. App. 95). In fact, by April 1994, after undergoing speech rehabilitation, Cleveland was able to speak fairly well. (J. App. 95). Dr. Herzog also confirmed that Cleveland had made significant progress in her recovery between January and April 1994. (J. App. 100).

In light of Cleveland's progress, Dr. Herzog released Cleveland to return to work in April 1994. (J. App. 100). At the time Cleveland was released to return to work, Dr. Herzog felt Cleveland's prognosis was positive for continued improvement and that she would eventually reach a near 100% recovery. (J. App. 100).

Cleveland's Notice To The Social Security Administration That Disability Benefits Were No Longer Needed

Cleveland returned to work for PMSC in April 1994 on a part-time basis. (J. App. 95). Shortly after returning to work, Cleveland received some paperwork from the SSA. (J. App. 95). Upon receiving this paperwork, Cleveland contacted the SSA and informed them that she had returned to work and that she no longer needed social security disability benefits. (J. App. 38, 95).

Cleveland's Return To Work

Cleveland worked part-time for about two weeks and then began working full time. (J. App. 95). Cleveland was

fearful about returning to work, but her supervisors, Anthony Clark and Debra Levine, claimed they would assist her, or, if necessary, would provide her another job. (J. App. 95-96). This did not occur. (J. App. 96-98).

All Requests For Reasonable Accommodations Were Denied

When Cleveland returned to work, she was not fully recovered from the stroke,[3] and she experienced some difficulty with the increased workload she was assigned. (J. App. 96). However, as the Fifth Circuit acknowledged in their August 14, 1997 Opinion, the Respondents denied each of Cleveland's requests for workplace accommodations, to wit: computer training; permission to take work home in the evenings; a transfer of position; and permission for the Texas Rehabilitation Commission to provide a counselor – free of charge – to assist Cleveland. (Pet. App. 3a;[4] J. App. 43-44, 96-97).

The Inexcusable Ridicule

In addition to the steadfast refusal to make any reasonable accommodations for Cleveland's disability, Cleveland's supervisor, Debra Levine, and other co-workers made cruel and mocking remarks in reference to Cleveland's disabled condition. (J. App. 43-44, 96). For instance, in Cleveland's presence, Levine and her co-workers

[3] Dr. Herzog noted that it sometimes takes 6-12 months to fully recover from a stroke. (J.App. 44).

[4] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari in this case.

laughed at Cleveland and belittled her by mimicking her stroke-induced speech impediment. (J. App. 96).

The Written Warning And Cleveland's Continued Determination To Succeed

After enduring her co-worker's taunts and her supervisor's refusal to accommodate her disability, on June 3, 1994, less than two months after returning to work from her stroke, Cleveland received her first written warning. (J. App. 97, 40). This warning, issued by Levine, criticized Cleveland's job performance and informed Cleveland that if there were not "drastic changes in the quality of work" that Cleveland would be "subject to be separated from the company." (J. App. 40). In response to this written warning, Cleveland did not surrender, but rather doubled her efforts to produce quality work, despite Levine's continued refusal to grant Cleveland's requests for accommodations.[5] (J. App. 97). In fact, a day or two

[5] In a June 21, 1994 memo, Levine (at Cleveland's request for an extension of time to train) agreed to extend Cleveland's training period to August 1, 1994, and to evaluate her job performance at that time to determine whether to terminate Cleveland or change her status to a fee inspector. Just half way through the promised extension period, however, Levine retracted this extension and terminated Cleveland. (J. App. 42, 97). (Cleveland had been told in Levine's June 3 written warning that Cleveland had been with the company for 9 months as a "Trainee" and that most employees were trainees for three to six months. Levine then stated that she had taken into account that Cleveland "had been out" for three months and informed Cleveland that on June 30, 1994 her employee status would be subject to change to that of a fee inspector or that Cleveland would be "separated from the company" if her performance did not drastically improve.) (J. App. 40).

before Cleveland's termination, Cleveland felt encouraged because, despite her supervisor's repeated refusal to provide training, Cleveland began to receive additional training from some of her co-workers. (J. App. 97).

In addition to finally receiving some training, Cleveland was experiencing fewer stroke-related problems during the time prior to the termination. (J. App. 97, 100). Specifically, Cleveland could more easily communicate, her spelling had improved and the need to recheck her work decreased.[6] (J. App. 97, 100). Cleveland felt positive about her job performance. (J. App. 97). Moreover, prior to her termination, Dr. Herzog had anticipated that Cleveland would experience a near 100% recovery. (J. App. 100-01).

The "Because You Will Never Be Able To Do Anything" Termination

Regardless, on July 14, 1994, Peter Moore, the Regional Vice President, and Debra Levine informed Cleveland that she was terminated allegedly because of poor job performance. (J. App. 97). Cleveland begged Moore to let her keep her job or move to another job. (J. App. 97). At this, Moore explained to Cleveland that his father had previously suffered a stroke and had not been able to do anything since. (J. App. 98). Moore then declared that, like his father, Cleveland would not be able to do anything either. (J. App. 98). During the initial

[6] Dr. Herzog observed that Cleveland was experiencing fewer problems with aphasia, but still needed additional time to recover. (J. App. 100).

termination meeting, Moore did agree to review Cleveland's work; however, the next day, Moore confirmed the termination. (J. App. 98).

Cleveland's Post-Termination Relapse And Resulting Requests For Reconsideration For Social Security Disability Benefits (with relevant excerpts from the benefit applications)

As a result of the humiliating manner in which she was treated and terminated, Cleveland was devastated, and she began to deteriorate both physically and emotionally. (J. App. 98, 101, 105-06). Specifically, Cleveland became depressed and her aphasia worsened after the July 1994 termination. (J. App. 43-44).

For this reason, on September 14, 1994, Cleveland renewed her prior application for social security disability benefits by filing a "Request for Reconsideration".[7] (J. App. 46, 98). In this request, Cleveland stated:

> I disagree with the determination made on my claim for disability-worker or child benefits because I was denied because I had returned to work and was making over $500. However, on July 15, 1994 I was terminated due to my condition and I have not been able to work since. I continue to be disabled.

[7] The Social Security Administration confirmed that Cleveland would not be entitled to receive disability benefits in a letter dated July 11, 1994. (J. App. 38-39). The SSA acknowledged that it had received notice that Cleveland had returned to work full time and was earning more than $500 per month. (J. App. 39). As indicated in a 4/23/94 note in Cleveland's SSA file, Cleveland had previously informed the SSA that she had returned to work. (J. App. 38).

(J. App. 46). In connection with this request, Cleveland also filed a "Work Activity Report" dated September 20, 1994 wherein she explained:

> I had my stroke 1/7/94 and was out of work for several months. I attempted to return to work mid April. I worked for three months before they terminated me because I could no longer do the job because of my condition.

(J. App. 47). Notably, that Cleveland could not do the job because of her condition was PMSC's stated reason for the termination. (J. App. 97-98).

In a "Supplemental Questionnaire" dated September 29, 1994 (signed by Cleveland and filled out by her daughter, Sheri Short), Cleveland described her then current symptoms and limitations. (J. App. 51-56). In response to an inquiry about activities which Cleveland could no longer do, she responded: "Find work related to my experience." (J. App. 52). Also, in response to a question about whether she had difficulty completing tasks, Cleveland responded: "Yes, in a timely manner due to length of time it takes to complete the task." (J. App. 56). (Notably, this statement is consistent with Cleveland's prior request to take work home with her to allow additional time to complete assignments – an accommodation which was denied by PMSC). (J. App. 96). In response to the SSA's inquiry into Cleveland's daily activities, Cleveland stated: "Routine tasks, make and keep appointments with government agencies, doctors; assist other stroke victims and the stroke recovery group." (J. App. 52).

In a notice dated November 30, 1994, the SSA informed Cleveland that her claim for disability benefits

was denied because she was not disabled under SSA regulations. (J. App. 62).

In approximately December 1994, Cleveland began seeing a psychologist, Bob L. Gant, Ph.D., for her depression and worsening condition. (J. App. 98). Dr. Gant determined that the loss of Cleveland's job and income were "emotionally devastating and have compounded her injury by affecting her self-confidence and self-esteem." (J. App. 70).

On January 9, 1995, Cleveland filed another "Request for Reconsideration" with the SSA. (J. App. 73). In this request, Cleveland repeated, as her reason for disagreeing with the prior determination, the reason given by PMSC for her termination: "I am unable to work due to my disability." (J. App. 73, 97-98). This request was denied in an April 17, 1995 notice from the SSA stating that Cleveland's condition was not severe enough to keep her from working. (J. App. 77-78).

Cleveland then asserted her right to appeal this decision and requested a hearing by an Administrative Law Judge. (J. App. 79). In her May 9, 1995 "Request for Hearing By an Administrative Law Judge", Cleveland again repeated, as her reason for disagreeing with prior decision, the reason given by PMSC for her termination: "I am unable to work due to my disability." (J. App. 79).

In a September 29, 1995 decision by the Administrative Law Judge ("ALJ"), Cleveland was granted social security disability benefits effective retroactively to January 7, 1994, the date of her stroke. (J. App. 83-92). The ALJ found that Cleveland was disabled at all times subsequent to the date of the initial January 1994 application and that she was entitled to "disability insurance benefits

pursuant to the Social Security Act and the regulations promulgated thereto." (J. App. 84). Consistent with the Social Security Act's guidelines for a determination of "disability", the ALJ's analysis in reaching his determination that Cleveland was "disabled" *did not include* an inquiry into, or consideration of, the effect reasonable workplace accommodations would have on Cleveland's ability to work. (J. App. 83-92). In fact, the "Decisional Findings of Fact" form completed by the ALJ, and used as a tool for making his decision, inquires about Cleveland's abilities in "usual work situations" or "routine work settings", and does not refer to accommodated work situations. (J. App. 85-87).

Procedural History Of Cleveland's ADA Case

Approximately one week before receiving notice of the decision from the SSA, Cleveland filed suit against PMSC for disability discrimination, failing to accommodate her disability and terminating her in violation of the Americans With Disabilities Act. (J. App. 5-8, 83-92). PMSC moved for summary judgment on this claim for the sole reason that Cleveland was judicially estopped from claiming to be a "qualified individual with a disability" under the ADA by reason of her application for and receipt of social security disability benefits. (Record 46-47).

Included in the evidence presented in opposition to the summary judgment motion was an affidavit from Steven Herzog, M.D., which stated that Cleveland suffered from aphasia and depression. (J. App. 100-01). Dr. Herzog confirmed that Cleveland's depression resulted from her termination and that her depression over the

termination caused her aphasia to worsen. (J. App. 99-103). Dr. Herzog further stated, in his opinion, that had Cleveland "been given training time and assistance on the job, instead of being terminated, she would have continued to recover from the stroke." (J. App. 101). Dr. Herzog also noted that "[w]ith time, understanding and therapy, Cleveland has slowly begun to recover from the post-termination relapse of her aphasia and depression." (J. App. 101).

Nevertheless, finding that Cleveland was judicially estopped from claiming to be a "qualified individual with a disability" because she previously declared herself "disabled" to the SSA, the district court granted summary judgment on Cleveland's ADA claim. (Pet. App. 14a).

The Fifth Circuit's Opinion

On appeal, in an Opinion dated August 14, 1997, the Fifth Circuit held:

> [T]he application for or the receipt of social security disability benefits creates a *rebuttable* presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is 'a qualified individual with a disability.'

(emphasis in original), *Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513, 518 (5th Cir. 1997); (Pet. App. 11a). Although ostensibly rejecting a per se estoppel application to ADA cases wherein the employee had applied for or received social security disability benefits, the Fifth Circuit determined that it would only be "under some limited and highly unusual set of circumstances" that

"the two claims would not necessarily be mutually exclusive. . . . " *Id.* at 517; (Pet. App. 8a-9a). After announcing its novel approach to this issue, the Fifth Circuit then affirmed the summary judgment and held that Cleveland "failed to raise a genuine issue of material fact which, if proved, would rebut the presumption that her sworn declarations of disability submitted to the Social Security Administration (SSA) judicially estop her from asserting that under the ADA she is a 'qualified individual with a disability.' " *Id.* at 514; (Pet. App. 12a).

In disposing of Cleveland's case, the Fifth Circuit never addressed the "reasonable accommodation" difference between an SSA claim and an ADA claim and declared that Cleveland "continuously and unequivocally" represented to the SSA that she was "disabled and completely unable to work"; and therefore, she could not "now be heard to complain that she could perform the essential functions of her job during the time between her return to work and her termination." *Id.* at 518; (Pet. App. 12a). The Fifth Circuit, without addressing the SSA's failure to consider workplace accomodations, stated: "[t]o permit Cleveland to make such an argument in the face of her prior, and – until now – uncontested sworn representations to the SSA would be tantamount to condoning her advancement of entirely inconsistent positions, a factual impossibility and a legal contradiction." *Id.* at 518; (Pet. App. 12a).

In addition to placing an inappropriately heightened legal burden on Cleveland (i.e., to overcome a presumption of judicial estoppel), the Fifth Circuit's opinion failed to acknowledge the summary judgment evidence that Cleveland could have performed the essential functions of her job *with reasonable accommodations*. *Id.* at 518-19;

(Pet. App. 12a; J. App. 7, 95-97). Likewise, the opinion incorrectly concluded that Cleveland's statements to the SSA were inconsistent with her position in her ADA case. *Id.* at 518; (Pet. App. 12a).

Cleveland's timely filed Petition for Rehearing was denied on September 15, 1997. (Pet. App. 16a).

Writ of Certiorari

Cleveland then sought certiorari. This Court granted certiorari on two issues:

> (1) Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.; and
>
> (2) If it does not create such a presumption, what weight, if any, should be given to the application for, or receipt of, disability insurance benefits when a person asserts she is a "qualified individual with a disability" under the ADA?

See Cleveland v. Policy Management Sys. Corp., 119 S.Ct. 39 (1998).

SUMMARY OF THE ARGUMENT

With a multitude of Americans receiving social security disability benefits today, and recognizing the history of discrimination against disabled individuals, requiring

social security disability applicants/recipients to overcome the heightened legal burden of a presumption of judicial estoppel in a disability discrimination claim is tantamount to repealing the ADA for millions of disabled individuals who clearly should have the benefit of its protection.

To judicially estop an individual from claiming to be a "qualified individual with a disability" based on representations made in connection with an application for social security disability benefits is inappropriate because there is simply nothing inconsistent in the position one takes in an ADA claim and in a claim for social security disability benefits. As such, a presumption of judicial estoppel has no place in determining the viability of a disability discrimination claim. Statements made in connection with an application for disability benefits should receive no greater weight than other statements or evidence; i.e., the statements should be considered in the context in which they were made and assigned the weight deemed appropriate by the factfinder.

When analyzing the facts in *Cleveland* and determining that her statements were "entirely inconsistent", the Fifth Circuit improperly failed to consider the context in which the statements were made and ignored the fact that assertions made in a social security disability context do not address the accommodation issue. Because the question of reasonable accommodation was not raised in the SSA proceeding, Cleveland's statements that she was "disabled" or "unable to work" or "unable to do [her] job" were not inconsistent with her claim in her ADA case that she would have been able to do her job *had she been provided reasonable accommodation*.

Moreover, similar statements to the SSA of an inability to work or total disability and the like, which are no doubt made by almost all other social security disability applicants, are not inconsistent with an ADA claim, and likewise should not give rise to judicial estoppel. Considering the context in which such statements of "disability" are made, and the lack of consideration of the accommodation issue, there is simply no inconsistency and no basis for creating a presumption of judicial estoppel.

ARGUMENT

I. The application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, *does not* create a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

II. The weight to be given statements made in connection with an application for disability benefits should be no different than the weight given to any other evidence, i.e., the weight the factfinder determines is appropriate.

At the time the Americans with Disabilities Act ("ADA") was enacted, Congress noted that there were some 43 million Americans with one or more physical or mental disabilities. *See* 42 U.S.C. § 12101(a)(1). Presently, there are approximately 7.3 million disabled individuals

who receive financial support via the social security disability benefits programs.[8] *See* House Comm. On Ways and Means, 1996 Green Book: *Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means* 16, 260 (Comm. Print 1996).

The History of Discrimination Against the Disabled

When the Americans with Disabilities Act of 1990 was enacted, Congress recognized:

> Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in and contribute to society.

42 U.S.C. § 12101(a). Congress confirmed that "historically, society has tended to isolate and segregate individuals with disabilities and that despite some

[8] This includes the total number of recipients receiving benefits under the Social Security Disability Insurance ("SSDI") program provided for in Title II of the Social Security Act and/or Supplemental Security Income ("SSI") program provided in Title XVI of the Social Security Act. Both the SSDI and the SSI programs provide financial support to the disabled. SSDI provides benefits to disabled workers who are considered entitled to insurance coverage by reason of payroll tax payments. *See* 42 U.S.C. § 423. SSI payments are provided to the disabled poor. *See* 42 U.S.C. § 1381-83.

improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem". *Id.*

Congress further concluded that discrimination based on disability persists in critical areas such as employment, and recognized that unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion or age, disabled individuals have often had no legal recourse to redress such discrimination. *Id.* According to Congress, "[t]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." *Id.* Congress noted:

> The continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from *dependency* and nonproductivity.

(Emphasis added). *Id.*

The Purpose of the ADA and the Social Security Disability Insurance Program

The purpose of the ADA is:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b).

The purpose of the Social Security Act in providing Social Security Disability Insurance ("SSDI") to disabled individuals is to provide financial support to those individuals who are unable to engage in substantial gainful activity due to medically determinable impairments – *without regard* to whether a specific job vacancy exists or *whether he would be hired if he applied for work.* (Emphasis added), 42 U.S.C. § 423. In other words, the SSA provides benefits to applicants meeting the definition of "disabled" without regard to whether a workplace accommodation would enable the applicant to perform a specific job. *Id.*; 20 C.F.R. § 404.1520(b-f).

A Presumption of Judicial Estoppel Confounds the Purpose of the ADA and SSA

In *Cleveland v. Policy Management Sys. Corp.*, the Fifth Circuit held:

> [T]he application for or the receipt of social security disability benefits creates a *rebuttable* presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is 'a qualified individual with a disability.'

(emphasis in original) *Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513, 518 (5th Cir. 1997) (Pet. App. 11a). Although ostensibly rejecting a per se estoppel rule in ADA cases where the employee has applied for or received social security disability benefits, the Fifth Circuit applied a presumption of judicial estoppel, reasoning that it would only be "under some limited and highly unusual set of circumstances" that "the two claims would not necessarily be mutually exclusive. . . . " *Id.* at 517 (Pet. App. 8a-9a).

Imposing such a presumption of judicial estoppel erroneously assumes that individuals who apply for SSA benefits and who also pursue their rights under the ADA are making inconsistent claims, and thereby, compromising the integrity of the judicial system.[9] In actuality, however, there is no inconsistency. *See* 20 C.F.R. § 404.1520(b-f); 42 U.S.C. § 12111(8). Rather than maintaining the integrity of the courts, the Fifth Circuit's judicial estoppel presumption instead precludes legitimate ADA claims asserted by disabled individuals who were doing nothing more than exercising their rights under two Federal Acts designed specifically to protect the disabled. In essence, the Fifth Circuit's opinion places

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[9] Typically, a presumption in the law arises when proof of a certain fact renders the existence of another fact sufficiently probable such that "it is sensible and time saving to assume the truth of [the other fact] until the adversary disproves it." *See* 2 *McCormick on Evidence* Sec. 343, at 454-55 (John W. Strong, 4th ed. 1992).

a uniquely onerous burden on SSDI recipients and reaffirms the position of political powerlessness of the disabled in our society.

Further, in applying this presumption, disabled individuals will essentially be forced to chose between an ADA claim and SSA benefits. *See Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582, 586 (D.C. Cir. 1997). Thus, such a presumption would confound the pro-employment purpose of the ADA and further increase the number of disabled individuals resorting to reliance on SSA disability benefits.[10] *See also, Id.* Surely, the ADA was not intended to relegate disabled persons to only one scheme of governmental assistance.

Moreover, in *McKennon v. Nashville Banner Publishing Co.*, this Court noted that the ADA, the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964 constituted part of a wide statutory scheme designed to protect employees in the workplace. *See McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 356, 115 S.Ct. 879, 884, 130 L.Ed.2d 852 (1995). This Court found that a litigant who pursues a claim under the anti-discrimination statutes, "not only redresses his own injury, but also vindicates the important congressional policy against discriminatory employment practices." *McKennon*, 115 S.Ct. at 884, *citing, Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45, 94 S.Ct. 1011, 1018, 39 L.Ed.2d 147 (1974) and *International Brotherhood of Teamsters v.*

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[10] Combined, the SSI and SSDI programs cost approximately 60 billion dollars a year, with the SSDI program accounting for approximately 40.9 billion dollars each year. *See* House Comm. On Ways and Means, 1996 Green Book: *Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means*, 17, 291 (Comm. Print 1996).

United States, 431 U.S. 324, 364, 97 S.Ct. 1843, 1869, 52 L.Ed.2d 396 (1977).

Clearly, a presumption that an SSDI applicant/recipient is judicially estopped from claiming to be a "qualified individual with a disability" is inappropriate because it would override the statutory schemes which were specifically designed to prevent discrimination, regardless of the egregiousness of the discriminatory conduct.

The Doctrine of Judicial Estoppel Is Inapplicable

Whether there is a "presumption" or not, the doctrine of judicial estoppel is inappropriate in an ADA case.

Judicial estoppel is an equitable doctrine which has been given differing definitions by the various Circuit Courts. For instance, the Fifth Circuit has held that judicial estoppel applies to prevent a party from asserting a position in a legal proceeding that is contrary to a position taken in the same or some earlier proceeding. *See Cleveland*, 120 F.3d at 517, *citing, Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996). According to the *Cleveland* court, the clear purpose of the doctrine is "to protect the integrity of the judicial system." *Id.*

> The Eleventh Circuit has held:
>
> [J]udicial estoppel 'is applied to the calculated assertion of divergent sworn positions. The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings.'

See Talavera v. School Bd. of Palm Beach County, 129 F.3d 1214, 1217 (11th Cir. 1997), *quoting, McKinnon v. Blue Cross & Blue Shield of Ala.*, 935 F.2d 1187, 1192 (11th Cir. 1991) (*quoting, American Nat'l Bank v. F.D.I.C.*, 710 F.2d 1528,

1536 (11th Cir. 1983)). The Seventh Circuit has applied judicial estoppel where (1) a latter asserted position was clearly inconsistent with an earlier position; (2) the facts at issue were the same in each case; and (3) the party to be estopped must have convinced the first court to adopt its position. *See Levinson v. United States*, 969 F.2d 260 (7th Cir. 1992). The Tenth Circuit finds: "Judicial estoppel bars a party from adopting inconsistent positions in the same or related litigation." *See Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1330 (10th Cir. 1998). The Third Circuit broadly directs that judicial estoppel is applied at the court's discretion, on a case by case basis, to preserve the integrity of the judicial system by preventing parties from "playing fast and loose" with the judicial system in taking inconsistent positions. *See McNemar v. Disney Store, Inc.*, 91 F.3d 610, 617 (3rd Cir. 1996), *cert. denied*, 117 S.Ct. 958 (1997).

Although the definitions of estoppel vary[11], common to most definitions is the requirement that the individual must have asserted a position in a prior proceeding that is "inconsistent" with the individual's position in the current proceeding. It is this element of "inconsistency" that, at first glance, appears obvious when comparing an individual's declaration to the SSA that they are "disabled" and "unable to work" with that same individual's claim in an ADA case that they are "disabled" and "able to work". This apparent inconsistency vanishes; however,

[11] It appears that this Court has not adopted the doctrine of judicial estoppel in the context of employment discrimination/civil rights cases, nor in other cases outside the context of patent law.

upon closer review of the context in which such statements are made, the distinct definitions of "disability" under each Act, and the differing importance each Act places upon the impact of workplace accommodations and the ability to work.

There is No Inconsistency

It is clear that with the distinctions between the two Acts, it is entirely consonant to be "disabled" under the SSA and also be a "qualified individual with a disability" under the ADA.[12] After all, to invoke protection under each Act, one must first prove to be "disabled". *See* 42 U.S.C. §§ 12112(a), 12111(8); 42 U.S.C. § 423(d); 29 C.F.R. § 404.1520(b-f). Only then, *and only under the ADA*, must the individual address whether she could work with reasonable accommodations, i.e., whether she is a "qualified individual with a disability" under the ADA. *Id.*

Specifically, to prevail in an ADA case, the plaintiff must first establish a *prima facie* case by demonstrating that (1) she has a disability; (2) she is otherwise qualified for the job in question; and (3) an adverse employment action was taken against her because of her disability. *See*

[12] *See also*, Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans With Disabilities Act and Federal Disability Benefit Programs*, 76 Tex. L. Rev. 1003, 1006-07 (1998) ("There is no inherent contradiction between the idea that some individuals should receive income support as a response to their disabilities and the notion that our society should remove obstacles faced by persons with disabilities in the job market and the workplace. Indeed, income support and civil rights protection can be seen as two essential parts of a comprehensive disability policy.")

Hamilton v. Southwestern Bell Telephone Co., 136 F.3d 1047, 1050 (5th Cir. 1998); *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 706 (5th Cir. 1997). In *Hamilton*, the Fifth Circuit expressly recognized that the threshold issue in an ADA case is a showing that the plaintiff is "disabled."[13]

Once it is established that a plaintiff has a "disability" under the ADA, the question then becomes whether the plaintiff is an "otherwise qualified individual with a disability", i.e., can the individual perform the essential functions of a job either with or without reasonable accommodation. *See Barber*, 130 F.3d at 706; 42 U.S.C. § 12111(8). The *Barber* court found that a determination of whether a plaintiff is "otherwise qualified" depends upon the resolution of two corollary questions: (1) what are the essential functions of the job in question; and (2) are any proposed accommodations reasonable. *Id.* at 706. As noted in *Barber*, the second question would become irrelevant only if the jury determined that the plaintiff could have performed the essential functions of her job *without* reasonable accommodation. *Id.* As such, in an ADA claim, the pivotal issues are whether the plaintiff is "disabled" under the ADA, and if so, can she, despite the disability, perform the essential functions of her job *either with or without reasonable accommodation*.

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[13] The *Hamilton* Court pointed out that the ADA confers the following "special meaning" on the term "disability":(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having an impairment. *Hamilton* at 1050; *see also, Bragdon v. Abbott*, 118 S.Ct. 2196, 2202 (1998); 42 U.S.C. § 12102(2).

Conversely, the SSA's determination of eligibility for SSDI benefits never makes an inquiry into reasonable workplace accommodation or the essential functions of a specific job. Specifically, in the context of an SSDI application, an applicant must demonstrate that they are "disabled" as defined by the SSA, i.e., that they are unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d)(1)(A). In making this determination, the SSA utilizes a five-step evaluation process:

> (1) The SSA determines whether the claimant is currently engaged in "substantial gainful activity". If so, the application is denied. If not, the SSA proceeds to step two.
>
> (2) The SSA determines whether the claimant has an impairment which is "severe" enough to significantly limit his ability to perform basic work activities. If not, the application is denied. If so, the SSA proceeds to step three.
>
> (3) The SSA determines whether the impairment is equivalent to an impairment which is listed as presumptively disabling in the regulations.[14] If the claimant's condition matches one of the listed impairments, the SSA awards disability benefits without making further inquiry. If the condition is not "listed", the SSA proceeds to step four.

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[14] *See* 20 CFR Pt. 404 Subpt. P, App. 1.

(4) The SSA determines whether the claimant is able to perform his "past, relevant work." If so, benefits are denied. If not, the SSA proceeds to step five.

(5) The SSA determines whether the claimant can perform "other work", i.e., jobs "that exist in significant number in the national economy." In making this determination, the SSA considers the claimant's age, education, past work experience and residual functional capacity. If so, the SSA denies the application. If not the SSA awards disability benefits.

See 20 C.F.R. § 404.1520(b-f); *Talavera v. School Bd. of Palm Beach County*, 129 F.3d at 1218-19.

In clear contrast to the ADA, nowhere in their analysis does the SSA consider the impact of possible workplace accommodations on the individual's ability to work. *See Talavera*, 129 F.3d at 1219, *citing*, *Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d at 585. For instance, at step three of the SSA evaluation, an applicant, who is not engaged in substantial gainful activity and has a "listed" disability, automatically receives benefits without inquiry into the applicant's actual ability to work. *Talavera*, at 1219; *Swanks*, at 585. Also, regardless of which evaluation step is considered, "[t]he fact that an individual may be able to return to a past relevant job, provided that the employer makes accommodations, [is] *not relevant*" in determining eligibility for social security disability benefits. (Emphasis added). *See* Daniel L. Skoler, Assoc. Comm'r SSA, Disabilities Act Info. Mem. (June 2, 1993), *reprinted in 2 Social Security Practice Guide*, App. Sec. 15C[9] (*SSA Guidance*), at App. 15-401 (MB 1997); *see also*, *Swanks*, 116 F.3d at 585.

Although the same threshold terminology is used in the context of both an ADA case and an SSA claim (e.g., "I am disabled"), coverage under each Act turns on a distinct and specific set of definitions and analysis. Thus, beyond the threshold question of "disability", the requisites for coverage under each Act are distinct. *See Swanks*, 116 F.3d at 583-84. The ADA focuses on an individual's ability to perform the essential functions of a job, either with or without accommodation. In contrast, the SSA relies on a variety of factors (including age, education, ability to perform work widely available in the national economy), none of which take into account the accommodation issue. 20 C.F.R. § 404.1520(b-f); *Swanks*, at 583-85. It is this inherent distinction that fundamentally renders the application of a presumption of judicial estoppel inappropriate in an ADA case.

Rejection of Judicial Estoppel by the SSA and EEOC

The application of a rebuttable presumption of judicial estoppel has been expressly rejected by the Equal Employment Opportunity Commission and the Social Security Administration: the two government agencies responsible for administering the ADA and the SSDI program.[15] (U.S. Amicus Brf. at 13)[16]. Both the EEOC and

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[15] This guidance from the SSA and EEOC is significant because, as this Court recognized in *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998), "the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " *Id.* at 2206.

[16] "U.S. Amicus Brf." refers to the Brief for the United States as Amicus Curiae filed in support of the Petition for a Writ of Certiorari in this case.

the SSA have concluded that "although statements made in applying for social security disability benefits may be relevant evidence in a subsequent ADA suit, application for or receipt of benefits is not by itself inconsistent with being a 'qualified individual with a disability' under the ADA." *See* U.S. Amicus Brf. at 13, *citing, EEOC Guidance* at 70:1251-1252, 70:1254-1257, 70:1259-1266; Pet. App. 36a-50a; *SSA Guidance* App. 15-400-402; Pet. App. 18a-35a.

The SSA specifically stated in a June 2, 1993 memorandum that eligibility standards under the ADA and SSA have "no direct application to one another"; therefore, a finding of "total disability" under the SSA is not "synonymous" with a finding of an inability to work either with or without reasonable accommodations for purposes of the ADA. *See* Americans With Disabilities Act of 1990 – INFORMATION, Memorandum from the Associate Commissioner, SSA at 1, 3. Also, as confirmed by the EEOC and SSA, there are many individuals who would qualify as disabled because of having one of the SSA's "listed" impairments, and that "many persons with listed impairments, for example, amputations, in fact are able to work quite successfully, even though SSA would find them 'disabled' if they decided not to work and instead sought benefits." (Pet. App. 26a).

Moreover, an SSDI recipient may engage in a period of "trial work" and still remain eligible for benefits. *See* 42 U.S.C. § 422(a)-(c). This trial work program clearly reflects the SSA's intent to encourage disabled individuals to work. *See Id.; Mohamed v. Marriott, Int'l, Inc.*, 944 F.Supp. 277 (S.D.N.Y. 1996). A person's ability to receive Social Security disability benefits while working demonstrates that judicial estoppel would contravene the

intended purpose of "trial work" if ADA employers could patently refuse to participate in "trial work."

Rejection of Judicial Estoppel by A Majority of the Circuit Courts of Appeals; Adoption of a Case by Case Analysis with No Greater Weight Assigned to Statements of Disability to the SSA.

A majority of the Circuit Courts have rejected application of judicial estoppel in ADA cases, and have instead resolved that statements made in connection with a SSDI application are to be considered on a case by case basis in the context in which they were made, enjoying no greater exalted weight than any other evidence.

Specifically, the United States Court of Appeals for the District of Columbia issued two opinions holding that receipt of social security disability benefits is *not* a bar to a disability discrimination claim. *See Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582 (D.C. Cir. 1997); *Whitbeck v. Vital Signs, Inc.*, 116 F.3d 588 (D.C. Cir. 1997). The court in *Swanks* and *Whitbeck* rejected the argument that a social security disability claim precludes a disability discrimination claim because the two schemes employ "quite different standards and objectives". *Swanks*, 116 F.3d at 583-4; *Whitbeck* 116 F.3d at 591. The D.C. Circuit in *Swanks* and *Whitbeck* recognized that in determining eligibility for social security disability benefits, the critical issue in an ADA case – *reasonable workplace accommodation* – is *not* considered. *Swanks*, 116 F.3d at 583-87; *Whitbeck*, 116 F.3d at 591. The D.C. Court noted that nowhere in the SSA's five step eligibility determination process is the question of reasonable workplace accommodation considered. *See Swanks*, 116 F.3d at

584-85. The *Swanks* Court further held that an SSA "determination that the claimant cannot do past work says nothing about the claimant's ability to perform his or her former job." *See Id.* at 585.

In *Swanks*, the court also noted that in reaching its conclusion, it did not mean that statements in support of a social security disability claim were never relevant in an ADA case. *Swanks*, at 587. For example, keeping with the position that SSA determinations do not consider whether a claimant could work with reasonable accommodations, the *Swanks* court noted that statements to the SSA of an inability to perform the essential functions of the job even with accommodation could bar the claimant from asserting in an ADA claim that an accommodation would have enabled the claimant to perform that same job.[17] *Swanks*, at 587.

Following *Swanks*, the Sixth Circuit in *Blanton v. Inco Alloys International, Inc.*, 123 F.3d 916, 917 (6th Cir. 1997)

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[17] In providing this example, the *Swanks* court cited *Pyramid Sec. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1123 (D.C. Cir. 1991) (holding that parties' prior sworn statements must be given "controlling weight" at summary judgment unless "the shifting party can offer persuasive reasons for believing the supposed correction."). In *Swanks*, there was no evidence before the court of Swank's statements made to the SSA; therefore, the court did not analyze the facts or otherwise assign weight to the statements. *Swanks* at 587. This reference to a "controlling weight" assessment is inappropriate, however, because it assumes that there is some "correction" being made, when in fact, in the majority of cases, there is no "correction" because there is no inconsistency. Indeed, the *Swanks* example of the applicant who claims to be unable to work even with reasonable accommodations is a rare case, but nonetheless should be evaluated on its particular facts.

rejected application of judicial estoppel. The *Blanton* Court found that the receipt of social security disability benefits does not preclude an ADA claim and that prior sworn statements are only considered as a material factor in analyzing the case.[18] *Id.* In *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376 (6th Cir. 1998), the Sixth Circuit confirmed that "statements made in an application for Social Security disability benefits, while relevant, do not result in judicial estoppel." *Id.* at 382.

Likewise, the Seventh Circuit determined that an individual's claim for social security disability benefits does not bar a claim under the ADA. *See Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997).[19] The *Weigel* court held that the granting of social security disability benefits "is not determinative as to whether or not she [the employee] may be considered a 'qualified individual' under the ADA." *Weigel*, 122 F.3d at 466. The Seventh Circuit held that statements of "disability" to the SSA are "not irrelevant to the question of whether an ADA plaintiff is a 'qualified individual with a disability' ". *Id.* at 466-68. The Court further held that, in the absence of

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[18] In *Blanton*, the court emphasized that it rejected judicial estoppel, and instead, simply found that "in light of the overwhelming weight of the medical evidence, as well as Blanton's own admissions" that Blanton was unable to perform his former position. *Blanton*, 123 F.3d at 917.

[19] *See also, Overton v. Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992) wherein the Seventh Circuit held that the issue of whether the plaintiff was entitled to social security disability benefits might be relevant to the severity of the handicap, but that such a determination could not be construed as a judgment that such a plaintiff was not qualified to do his job under the Rehabilitation Act.

evidence that the individual could have performed her prior job with reasonable accommodation, such statements along with other evidence could support summary judgment. *Id.*

However, the *Weigel* court, also observed that declarations of being " 'wholly unable to work,' or some other variant to the same effect" are not conclusive on the issue of whether that same individual is a "qualified individual with a disability" under the ADA. *Id.* at 466-67. Therefore, the court found that the apparent incongruity between an ADA claim and an SSA claim is "entirely illusory because the terms, 'totally disabled' and 'qualified individual with a disability' are terms of art that must be understood within their respective statutory contexts." *Id.* at 466.

Following *Weigel*, the Seventh Circuit left no doubt that it does "not apply judicial estoppel to foreclose ADA claims when the claimant has applied for disability benefits." *See Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591, 603 (7th Cir. 1998). In *Haschmann*, the court maintained this anti-estoppel position in recognition of the distinctions between the ADA and the SSA, including the ADA's consideration of the impact of reasonable accommodations. *Id.* As in *Weigel*, the court again held that, while not dispositive, the receipt of disability benefits may be relevant to the issue of whether an individual is a qualified individual with a disability. *Haschmann*, 151 F.3d at 603. In upholding the finding that Haschmann was a "qualified individual with a disability", the court analyzed Haschmann's statements in the context and time frame in which they were made. *Id.* at 603-04. This analysis revealed that although Haschmann was awarded benefits, her statements to the SSA were not inconsistent with her position in her ADA case. *Id.*

In *Talavera v. School Board of Palm Beach County*, 129 F.3d 1214 (11th Cir. 1997), the Eleventh Circuit Court of Appeals also rejected application of judicial estoppel in ADA cases. The court specifically held that "a certification of total disability on an SSD [social security disability] application is not inherently inconsistent with being a 'qualified individual with a disability' under the ADA." *Talavera*, 129 F.3d 1220. When analyzing the interplay between a claim for social security disability benefits and a claim of being a "qualified individual with a disability", the Eleventh Circuit recognized that the Fifth Circuit's opinion in *Cleveland* exuded an "obvious skepticism" and displayed a reluctance to find that individuals who are "totally disabled" for social security disability purposes are covered by the ADA.[20] *Id.* at 1219.

Rejecting the "skeptical" position of the Fifth Circuit, the Eleventh Circuit held that: "A certification of total disability on a SSDI application does mean that the applicant cannot perform the essential functions of her job without reasonable accommodation. It does not necessarily mean that the applicant cannot perform the essential functions of her job with reasonable accommodation." *Talavera*, 129 F.3d at 1220. After examining the particular facts of the case, including the claims of total disability to the SSA, the *Talavera* court determined that based on the evidence, there was a dispute of fact as to whether Ms. Talavera's disability rendered her unable to perform the

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[20] Indeed, as noted by the Solicitor General's amicus brief in support of a writ in this case, countless ADA cases in the Fifth Circuit have been barred based on the "essentially all cases are barred" directive from *Cleveland*. (*See* U.S. Amicus Brf. at 11).

essential functions of her job *with accommodation*. *Id.* at 1221.

Likewise, the Ninth Circuit rejected judicial estoppel in ADA cases in *Johnson v. Oregon Dept. of Human Resources Rehabilitation*, 141 F.3d 1362 (9th Cir. 1998). The court observed:

> [W]hat may be considered a disability or total disability under legal precepts of certain federal or state disability statutes or private instruments conferring disability benefits may differ under provisions of other federal or state legislation or other private instruments. Therefore, a statement averring a legal conclusion in a previous application or proceeding as to disability may not always preclude eligibility in subsequent applications or proceedings. Having said this, however, we emphasize that material factual statements made by an individual in prior disability applications or proceedings may be binding in subsequent claims.

Johnson, 141 F.3d at 1368. However, the court further expounded and said:

> [T]he law does not require plaintiffs to choose between applying for benefits and pursuing an ADA claim. *They may do both.*

(Emphasis added) *Id.* at 1370.

The *Johnson* court further observed that such representations may constitute useful evidence, and that a " 'straightforward summary judgment analysis, rather than theories of estoppel' will be appropriate in most cases." *Id.* at 1369; *citing, Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 382-83 (6th Cir. 1998). After reviewing the statements of disability made by Johnson to the SSA, the

court held that there was no inconsistency with her ADA claim. *Johnson*, 141 F.3d at 1369-70. Specifically, the court noted that the description of her disability in her applications matched that in her ADA case and that she did not tell the SSA that she could not work even with accommodation. *Id.* The court therefore found that her representations of disability were not irreconcilable, and that there was no evidence that Johnson "acted in bad faith or was playing fast and loose with the courts." *Id.* at 1370.

As with the majority of Circuits, the Tenth Circuit likewise rejected application of judicial estoppel to ADA cases where the plaintiff has applied for or received social security disability benefits. *See Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998). The *Rascon* court held that statements made in connection with an application for social security disability benefits cannot be an automatic bar to an ADA claim, but may constitute evidence relevant to a determination of whether the plaintiff is a "qualified individual with a disability." *Id.* at 1332. The *Rascon* court also noted that despite Rascon's representations in his application for disability benefits that he did not *ever* plan to return to work, there was no evidence that he could not have performed the essential functions of the job with reasonable accommodation. (Emphasis added) *Id.*

In sum, the EEOC, the SSA and a majority of the Circuit Courts of Appeals, reject a strict application or presumption of judicial estoppel and have resolved that statements made in an SSDI application may be relevant (as with any other type of evidence in an ADA case), but are not dispositive on the "qualified individual with a

disability" issue.[21] As was done in *Talavera, Johnson, Rascon, Haschmann* and *Weigel,* the weight to be given statements made in connection with an application for SSDI benefits should be determined on a case by case

[21] *Cf., McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 617-18 (3d Cir. 1996), *cert. denied*, 117 S.Ct. 958 (1997) (plaintiff was judicially estopped from claiming to be "qualified" under the ADA; plaintiff's statements made on his disability benefits application that he was "totally disabled" and "unable to work" were "unconditional assertions as to his disability" and he should not be permitted to "qualify" such statements); *Moore v. Payless Shoe Source, Inc.*, 139 F.3d 1210, 1213 (8th Cir. 1998) ("prior representations of total disability carry sufficient weight to grant summary judgment against the [ADA] plaintiff" absent "strong countervailing evidence that the employee is in fact qualified"; affirming summary judgment on ground that affidavit of plaintiff stating she could have performed her job with reasonable accommodations was not sufficient evidence to countervail her on-going representations to the SSA that she was "unable to work"; but also, stating that a less strict standard may have applied had plaintiff specified to the SSA that she requested reasonable accommodations). These cases, like *Cleveland*, essentially divide the disabled into two groups, i.e., those who can work and those who cannot. In addition to deviating from the position of the EEOC, the SSA and a majority of the Circuit Courts, this approach is erroneous because it is not possible to make meaningful determinations about whether a disability can be reasonably accommodated under the ADA outside the context of a specific job – a context which the SSA does not consider. *See also*, Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans With Disabilities Act and Federal Disability Benefit Programs*, Tex. L. Rev. 1003, 1007 (1998).

Notably, the Third Circuit in *Krouse v. American Sterilizer Co.*, 126 F.3d 494 (3rd Cir. 1997) observed that *McNemar* had come under considerable criticism, some of which might be well-founded. *Id.* at 502-03.

basis after an evaluation by the factfinder of the context in which the statements were made.[22]

A presumption of judicial estoppel in ADA cases is wrong because of the obvious differences in each Act, many individuals could meet the criteria for benefits under both Acts, and could do so legitimately without compromising their integrity or the integrity of the courts or the administrative system. Accordingly, there should be no presumption of, or any, judicial estoppel in an ADA case, nor should declarations of disability to the SSA be given greater weight than any other evidence.[23]

[22] The statements made in connection with an SSA application will no doubt vary from case to case; therefore, a case by case analysis of the weight to be given such statements is proper. *See McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. at 886 (in cases involving after-acquired evidence issues, "the factual permutations and equitable considerations" will vary from cases to case, and therefore, the proper remedial relief should be addressed by the judicial system in the ordinary course of further decisions).

[23] Although an ADA claimant who has previously sworn to the SSA that she is "unable to work either with or without reasonable accommodations" may have an "inconsistency" issue sufficient to constitute a bar, in light of the distinctions in the Acts, even such specifically inconsistent statements should be evaluated on a case by case basis in the context in which they were made. In other words, statements to the SSA, whether they address the issue of reasonable accommodation or not, should be treated the same as any other evidence presented in an ADA case. If in fact, upon evaluation there is an inconsistency, the impact of such, as with any other credibility assessment, should be determined by the factfinder.

Cleveland was not "inconsistent"

Employers such as PMSC should not be exempt from ADA compliance because a disabled individual, who at some point in time applied for or received social security disability benefits, is required to overcome a heightened legal burden which is not only unwarranted, but also, under the *Cleveland* Opinion, virtually impossible to rebut. The misguided impact of a presumption of judicial estoppel is particularly evident on closer review of Carolyn Cleveland's statements to the SSA. Upon consideration of the context in which the statements were made, there is nothing inconsistent between these statements and her position in her ADA case.

Cleveland is a perfect representative of the type of individual who should have been able to invoke the protection of the ADA to redress the disability-based discrimination she suffered. Yet under the Fifth Circuit's "rebuttable presumption" application of judicial estoppel, the merits of her ADA claim were not even considered. Instead, after summarizing selected statements from Cleveland's applications for social security disability benefits, and without considering the fact that the SSA does not inquire about (or even consider) the issue of reasonable accommodations, the Fifth Circuit determined that Cleveland's statements to the SSA precluded her from rebutting "the presumption that while she remains disabled for purposes of Social Security, she is estopped from asserting that she is a 'qualified individual with a disability.' " *Cleveland*, 120 F.3d at 518; Pet. App.12a. Had Cleveland's statements been evaluated in their entirety in the context in which they were made, and in the absence of a presumption that she was judically estopped to claim she was "otherwise qualified" under the ADA, an alleged

inconsistency would never have materialized in the first place.

Specifically, in *Cleveland*, the Fifth Circuit's opinion focused on the following excerpts from the SSA file: (1) an initial application filed with the assistance of her daughter, where Cleveland certified that she was "unable to work because of her disabling condition on January 7, 1994" and was "still disabled"; (2) a September 1994 (post termination) "Request for Reconsideration" which stated "I continue to be disabled"; (3) a "Work Activity Report" wherein Cleveland stated she was terminated "because I could no longer do the job because of my condition"; (4) a January 1995 "Request for Reconsideration" and a May 1995 request for hearing before an ALJ wherein she stated she was "unable to work due to my disability". (Pet. App. 3a; *Cleveland*, at 514-15, 518).

In arriving at the conclusion that Cleveland's statements were "inconsistent", the Fifth Circuit failed to acknowledge the context in which these selected statements were made. First, as previously pointed out in this Brief, the statements themselves are not inconsistent with her claim to be a "qualified individual with a disability" because they were made in a forum which does not consider the effect that reasonable workplace accommodations would have on the ability to work. Additionally, if the statements are examined in the time period in which they were made, they are each accurate statements. For instance, in January 1994 when the application was originally submitted, Cleveland had just suffered her stroke and was unable to work. (J. App. 94-95, 100, 104-05). Additionally, in asserting that Cleveland "continuously and unequivocally represented to the SSA that she

is totally disabled and completely unable to work"[24], the Fifth Circuit ignored the fact that Cleveland notified the SSA in April 1994 that she had returned to work and no longer needed benefits. (J. App. 38, 95). In fact, it was the notice to the SSA that Cleveland had returned to work that prompted the initial denial of SSDI benefits. (J. App. 38-39). Although not noted by the Fifth Circuit, Cleveland explained in her September 1994 Request for Reconsideration:

> I disagree with the determination made on my claim for disability-worker or child benefits because I was denied because I had returned to work and was making over $500. However, on July 15, 1994 I was terminated due to my condition and I have not been able to work since. I continue to be disabled.

(J. App. 46). Notably, from this explanation, the Fifth Circuit in claiming that Cleveland was being less than honest, excised and showcased only the "I continue to be disabled" statement. Likewise, the Fifth Circuit ignored the summary judgment evidence demonstrating that but for PMSC's refusal to accommodate Cleveland's disability and ultimate termination, Cleveland would not have requested reconsideration of the initial denial of benefits. (J. App. 95-98, 100-01). The court also failed to consider the evidence submitted by Cleveland and her doctors which demonstrated that, as a direct result of her termination, Cleveland's medical condition worsened to the point that she was unable to work. (J. App. 64-65, 69-72, 98, 100-101).

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[24] *Cleveland*, at 518; Pet. App. 12a.

In examining the "Work Activity Report", the Fifth Circuit again considered only part of the statement, as opposed to her entire explanation:

> I had my stroke 1/7/94 and was out of work for several months. I attempted to return to work mid April. I worked for three months before they terminated me because I could no longer do the job because of my condition.

(J. App. 47). Although the Fifth Circuit insinuated that Cleveland was being less than forthright when she stated that she was terminated because she could not do the job (the only sentence of this excerpt that the Court focused on), Cleveland only repeated what PMSC had told her, i.e., that she could no longer do the job because of her condition. (J. App. 97-98). Recall, in terminating Cleveland for poor job performance, Peter Moore informed Cleveland that his father had never been able to do anything after having a stroke and neither would Cleveland. (J. App. 97-98). In concluding that Cleveland was advancing inconsistent positions, the Fifth Circuit completely discounted this fact, and likewise ignored Cleveland's evidence that had she been accommodated, she could have continued employment. (J. App. 95-98).

The Fifth Circuit also disregarded the fact that reasonable job accommodation is *not* an issue for the SSA and bears no relevance to the SSA's inquiry into Cleveland's "disabled" status. *See Swanks* at 583-87. As such, reasonable workplace accommodation is not relevant nor considered by the SSA.[25] Nevertheless, additional statements made by Cleveland to the SSA confirm that she

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[25] Similarly, Cleveland's belief that PMSC discriminated against her because of her disability is not an issue for the SSA

needed accommodations such as additional time to perform tasks. Specifically, in a September 1994 "Supplemental Questionnaire" Cleveland explained her difficulty completing tasks as follows: "Yes, in a timely manner due to length of time it takes to complete the task." (J. App. 56). Although ignored by the Fifth Circuit, this statement is consistent with Cleveland's prior request to take work home with her to allow additional time to complete the assignment – an accommodation which was denied by PMSC. (J. App. 96).

Likewise, Cleveland's statements that "I am unable to work due to my disability" made in her January and May 1995 reconsideration requests were true at the time, and were not inconsistent with her position in her ADA claim. In these non-specific statements, Cleveland did not reference (nor was she asked or required to reference) whether she could have worked had PMSC accommodated her, rather than terminating her and causing her condition to deteriorate. Whether pre- or post-termination, there is nothing inconsistent in Cleveland's various statements which would warrant a presumption of judicial estoppel, much less, a holding that Cleveland failed

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(and was not raised in her SSA application). As with a claim of disability discrimination, a claim of an ability to work with reasonable accommodations, is properly voiced in an ADA lawsuit – a forum which, unlike the SSA, considers such issues relevant. That Cleveland, or any other SSA applicant, informs the SSA that they are unable to work, without specifying whether they could work with reasonable accommodations, simply does not create an inconsistency with an ADA claim and does not warrant application of a presumption of judicial estoppel.

to rebut the presumption. Cleveland's summary judgment evidence plainly established genuine issues of material fact which precluded summary judgment.

Clearly, Cleveland's statements regarding her disability are not inconsistent and do not invoke the application of a presumption of judicial estoppel.[26] In applying a presumption of judicial estoppel, the Fifth Circuit not only erroneously saddled Cleveland with a heightened legal burden, but created a burden which is simply antithetical in the context of an ADA case. After all, Congress surely did not intend for the ADA's protection to be unavailable to 7.3 million SSDI recipients in this Country who might otherwise return to gainful employment.

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[26] Even if this Court were to determine that judicial estoppel applies in ADA cases (which Petitioner asserts that it should not) and that Cleveland's statements were inconsistent (which they are not), PMSC, as a result of its own unlawful conduct, is not entitled to benefit from this doctrine because "it [estoppel] is for the protection of the innocent, and only the innocent may invoke it." *See Douglas v. Aztec Petroleum Corp.*, 695 S.W.2d 312, 317 (Tex. App. – Tyler 1985, no writ); *See also, Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 752 F.2d 178, 183 (5th Cir. 1985). The *Douglas* court further held that "[a] person my not predicate an estoppel theory in his favor on, or assert such estoppel for the purpose of making effective, obtaining the benefit of, or shielding himself from the results of his own fraud . . . dereliction of duty, *violation of the law*, wrongful act or other inequitable conduct in the transaction in question." *Id.* At 317-18.

CONCLUSION

For the above reasons, Petitioner, Carolyn C. Cleveland, respectfully requests that this Court reverse the judgment of the Fifth Circuit and remand this case to the District Court for trial on the merits.

Respectfully submitted,

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October Term, 1998

CAROLYN C. CLEVELAND,

Petitioner,

vs.

POLICY MANAGEMENT SYSTEMS CORPORATION; GENERAL INFORMATION SERVICES, a Division of Policy Management Systems Corporation; and CYBERTEK CORP.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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QUESTIONS PRESENTED

1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq.

2. If it does not create such a presumption, what weight, if any, should be given to the application for, or receipt of, disability insurance benefits when a person asserts she is a "qualified individual with a disability" under the ADA?

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BRIEF OF RESPONDENTS

Respondent, Policy Management Systems Corporation,[1] requests that the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, affirming the district court's grant of summary judgment for Respondent, be affirmed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 120 F.3d 513 (5th Cir. 1997), and printed at Appendix A to the Petition for Writ of Certiorari, affirmed the decision of the United States District Court for the Northern District of Texas, which granted summary judgment in favor of Respondent. The district court's September 6, 1996 judgment is printed at Appendix B to the Petition for Writ of Certiorari. The Fifth Circuit's September 15, 1997 Order denying Petitioner's Petition for Rehearing is printed at Appendix C to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Fifth Circuit was entered on August 14, 1997. Petitioner filed a petition for rehearing which was denied on September 15, 1997. The Petition for

[1] Petitioner also sued General Information Services ("GIS") and Cybertek. GIS was never a separate entity from PMSC and Petitioner never worked for Cybertek. (R.I 5) Therefore, Policy Managment Systems Corporation ("PMSC") or "Respondent" will be used herein to refer to Petitioner's former employer.

Writ of Certiorari was filed on December 15, 1997. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Carolyn Cleveland ("Cleveland") brought this action against her former employer, Policy Management Systems Corporation ("PMSC"), claiming that she was terminated in violation of the Americans With Disabilities Act ("ADA").[2]

Cleveland was hired by PMSC on August 30, 1993, to perform telephonic background checks on prospective employees of PMSC's clients. Specifically, PMSC's clients forwarded employment applications to PMSC telephone operators like Cleveland. PMSC telephone operators performed the background check on the applicant and provided a report to the client. (R.I 86-87).[3]

On January 7, 1994, Cleveland had a stroke and took a leave of absence from PMSC.[4] (R.I 88). On January 21, 1994, Cleveland filed for Social Security disability benefits and specifically represented to the Social Security

[2] Cleveland also claimed PMSC retaliated against her for filing a workers' compensation claim. The retaliation claim was severed after the Motion for Summary Judgment was granted and is currently pending in Texas state court.

[3] R.I and R.II refer to volumes one and two of the Record.

[4] Cleveland states she suffered a stroke "during the course and scope of her employment." (Petitioner's Brief p. 5). While Cleveland may have had a stroke while working, there is no evidence her stroke was caused by her work.

Administration ("SSA") that she had a disabling condition dating from January 7, 1994. (J.A. 13-20). She was ultimately awarded benefits retroactive to January 7, 1994.

A. Cleveland swears she became disabled and unable to work on January 7, 1994.

On January 26, 1994, Cleveland signed a formal application for Social Security disability benefits and specifically stated the following:

> I became unable to work because of my disabling condition on January 7, 1994.
>
> I am still disabled.
>
> I know that anyone who makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime. . . . I affirm that all information I have given in connection with this claim is true.

(J.A. 20-24).[5]

B. Cleveland returns to work and continues to pursue Social Security disability benefits.

On April 11, 1994, Cleveland returned to her job and PMSC allowed her to work half days. (J.A. 95). On April 25, 1994, she returned to full duty. (J.A. 95). Meanwhile,

[5] J.A. refers to the Joint Appendix filed by the parties.

the SSA forwarded Cleveland's claim to the Texas Rehabilitation Commission ("TRC"), which requested additional information from Cleveland on April 20, 1994. (J.A. 37-38). After the TRC attempted to contact Cleveland to obtain information about her claim, she informed the TRC that she had returned to work in April. (J.A. 38). The SSA's file does not contain any requests from Cleveland withdrawing her claim for benefits or asserting that she no longer had a disability. (R.II 56-386).

Despite PMSC's numerous attempts to help Cleveland and to train her, she could not perform her job. (J.A. 40-42). PMSC even extended Cleveland's training period in the hope she could perform her duties. (J.A. 40-41). Despite PMSC's efforts, Cleveland recognized and told the SSA she "attempted to return to work . . . [but she] could no longer do [her] job because of [her] condition." (J.A. 47). On July 15, 1994, PMSC terminated Cleveland for poor job performance.[6] (R.I 91).

[6] PMSC denies that Cleveland requested accommodation or that a reasonable accommodation was possible. PMSC did not present evidence on the fact intensive issue of reasonable accommodation because its Motion for Summary Judgment was based on Cleveland's continuous assertions to the SSA of her inability to work which precluded her from claiming to be a "qualified individual" under the ADA. Petitioner's factual allegations were alleged in an affidavit in response to PMSC's Motion for Summary Judgment. Respondent timely filed Objections and Motion to Strike Petitioner's evidence which was never ruled on by the court. (R.I 139-44).

C. Cleveland swears that she *continues to be disabled.*

On July 11, 1994, the SSA denied Cleveland's request for benefits. (J.A. 38-39). On September 14, 1994, Cleveland filed a Request for Reconsideration stating: "I disagree with the determination made on my disability. . . . I continue to be disabled." (J.A. 46). Cleveland's statement that she "continue[d]" to be disabled is consistent with her representations that she was disabled beginning January 7, 1994, not just after her termination. Moreover, Cleveland ultimately received benefits from that date.

D. A critical admission – in her own handwriting, and under penalty of perjury, Cleveland declares: "I could no longer do the job because of my condition."

On September 20, 1994, Cleveland filed a form with the SSA stating she "worked 3 months or less and stopped because of [her] injury or illness." (J.A. 47).

Significantly, she also stated in her own handwriting that she was terminated "because [she] could no longer do the job because of [her] condition." (J.A. 47).

E. Cleveland's treating doctor classifies her as 100% disabled.

In September 1994, Cleveland's neurologist, Dr. Steven Herzog, stated that Cleveland "suffered . . . a stroke on 1/7/94 causing aphasia. This has produced complete disability. . . . " (J.A. 45). Dr. Herzog classified

Cleveland as "100% disabled."[7] (J.A. 45). Dr. Herzog's records were provided to the SSA by Cleveland as part of her pursuit of benefits. (J.A. 43-46).

F. Cleveland again admits she went back to work but could not work.

On November 11, 1994, Cleveland stated to Cary Conaway, Ph.D. of the TRC, that she was at the examination "[t]o get [her] disability. . . . " (J.A. 57). When asked why she had applied for disability benefits, Cleveland responded, "I had a stroke in January 1994; I went back to work but I couldn't work." (J.A. 57). On November 30, 1994, the SSA denied Cleveland's request for benefits. (J.A. 62-64).

G. Cleveland diligently pursues her benefits and again represents that she cannot do her job because of her disability.

On January 9, 1995, Cleveland signed a further Request for Reconsideration to the SSA, stating: "[she was] unable to work due to [her] disability." (J.A. 73-74).

---

[7] Petitioner contends Dr. Herzog expected her to recover completely. (Petitioner's Brief p. 7.) None of the information Dr. Herzog produced to the SSA indicates Cleveland was expected to fully recover. (R.II 56-386). Dr. Herzog did send a letter to the Equal Employment Opportunity Commission, but it was never provided to the SSA. (R.II 56-386). The Joint Appendix incorrectly indicates that Dr. Herzog's letter to the Equal Employment Opportunity Commission was a part of the SSA file.

On May 9, 1995, Cleveland requested a hearing before an Administrative Law Judge, representing "[she was] unable to work due to [her] disability." (J.A. 79).

H. Another doctor confirms Cleveland's admission of total incapacity.

On May 12, 1995, Cleveland's treating physician, Dr. Bob L. Gant, stated, **"I believe this patient is permanently and completely disabled from any productive work."** (J.A. 71-72). These records were provided to the SSA as part of Cleveland's pursuit of benefits. (R.II 75).

I. Based on the representations of Cleveland and her doctors, Cleveland is found to have been completely disabled from any productive work beginning January 7, 1994.

On September 29, 1995, the Administrative Law Judge, Harold G. Adams, concluded Cleveland **"became disabled on January 7, 1994 and continues to be disabled through the date of this decision."** (J.A. 83). He further ordered that she was **"entitled to a period of disability commencing January 7, 1994. . . . "** (J.A. 84).[8]

In making his determination, Judge Adams relied in part on a medical source statement where the doctor found Cleveland's condition existed and persisted since at least January 1994, six months before any adverse employment action. (J.A. 82).

---

[8] Cleveland received benefits under Title II of the Social Security Act. *See* 42 U.S.C. § 401.

J. Cleveland changes her story in an effort to avoid the unequivocal representations she made to the SSA.

All of Cleveland's representations to the SSA state she was disabled and that, despite her brief attempt, she could not work. (J.A. 20-24, 47, 57). Cleveland now implies that it was only after, and as a result of her termination, that she actively pursued and received Social Security disability benefits. (Petitioner's Brief pp. 11-14). The record, however, shows Cleveland consistently stated her disability began on the date of her stroke, January 7, 1994. (J.A. 20-24, 47, 57). She contended only after this suit was filed that her disability began or worsened after her termination from PMSC. (J.A. 20-24, 47, 57).[9]

Procedural Background of Cleveland's ADA Claim

On September 22, 1995, Cleveland filed suit claiming, inter alia, violations of the ADA (See Footnote 2). PMSC filed a motion for summary judgment on the ADA claim based on Cleveland's representations to the SSA. PMSC's position was that Cleveland could not establish a prima facie case under the ADA because she could not show she was a "qualified individual with a disability." Such an individual is one who can perform the essential functions of her job with or without a reasonable accommodation.

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[9] Cleveland's Complaint does not allege that her disability began after her termination. (J.A. 5-8). Rather, it was only in response to Defendant's Motion for Summary Judgment that Cleveland first made this contention. (R.I 91).

42 U.S.C. § 12111(8). Because Cleveland and her doctors repeatedly described her as completely disabled, the district court logically and appropriately ruled she could not simultaneously and inconsistently seek the protection of the ADA.

Cleveland appealed the ruling to the Fifth Circuit, which held that the application for, or the receipt of, Social Security benefits creates a rebuttable presumption that the claimant is judicially estopped from asserting she is a "qualified individual with a disability." *Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513, 518 (5th Cir. 1997). Affirming the lower court, the Fifth Circuit ruled that, "on the facts before [it]," Cleveland could not rebut her "unambiguous" and "uncontroverted" representations to the SSA and, therefore, was not a "qualified individual with a disability." *See id.* The court observed "[t]o permit Cleveland to make such an argument in the face of her prior, consistent and – until now – uncontested sworn representations to the SSA would be tantamount to condoning her advancement of entirely inconsistent positions, a factual impossibility and a legal contradiction." *See id.*

SUMMARY OF THE ARGUMENT

The application for, or receipt of, Social Security benefits creates a rebuttable presumption that the applicant is judicially estopped from asserting she is a "qualified individual with a disability" within the meaning of the

ADA. This standard is a reasonable, case-specific, common sense approach to determining if a claimant's representations are irreconcilably conflicting. Though stated in the context of "presumption" and "estoppel," the standard is nothing more than the logical application of established legal principles. This standard recognizes and provides a basis for reconciling any differences between the ADA and the Social Security Act. It does not create a per se bar which forever precludes SSA applicants/recipients from seeking the protection of the ADA, but at the same time does not turn a blind eye and deaf ear to sworn representations made to the SSA. Quintessentially fair, it holds individuals to the legal consequences of their words – if you say, as did Cleveland, that you cannot do your job because you were disabled then you cannot later, **absent proper explanation**, come into a court and say you were qualified to do your job.

If this Court does not adopt the Fifth Circuit's standard, an applicant's sworn representations to the SSA are nevertheless relevant to the determination of "qualified individual" status under the ADA and, as here, can be dispositive. Petitioner and the United States acknowledge that prior representations can be material in determining a claimant's ADA status. The parties differ only on the weight to be given to a particular representation, but there can be no doubt that in certain cases summary judgment is appropriate. Based on the consistent, unambiguous representations Cleveland made in order to receive benefits, this case is one of those certain cases for which summary judgment must be granted.

ARGUMENT

I. The Application For, or Receipt Of, Disability Insurance Benefits under the Social Security Act, 42 U.S.C. § 423, Creates a Rebuttable Presumption that the Applicant or Recipient Is Judicially Estopped from Asserting that she is a "Qualified Individual with a Disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

A. The Fifth Circuit's Standard is Fair, Even-handed and Grounded in Common Sense and Established Law.

A rebuttable presumption of judicial estoppel protects the disabled individual and the integrity of the judicial system, while also upholding the purposes of the two statutes. Cleveland, the United States and the various amici have overlooked the flexibility of the standard in their unyielding opposition to the Fifth Circuit's position. They argue that the presumption/estoppel standard is not appropriate because the ADA and the Social Security Act have different meanings for the word "disability."[10] Likewise, they suggest that the Fifth Circuit's standard improperly regards the statutes as alternative methods of recovery, as opposed to complementary ones.[11] These arguments are misplaced. The Fifth Circuit's standard provides a method, in the proper case, for reconciling differences that may exist between the ADA and the

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[10] *See* Petitioner's Brief pp. 27-31; United States, et al. amicus brief pp. 7-18.

[11] *See* Petitioner's Brief p. 24; United States, et al. amicus brief pp. 9-10.

Social Security Act and, thus, allows the statutes to complement one another in the manner Congress intended. Moreover, though the Fifth Circuit uses the words "estoppel" and "presumption," it has not adopted a standard that is different from what courts have been using for years. Rather, the *Cleveland* standard requires a case by case analysis utilizing the existing framework for discrimination cases including, where applicable, established rules for deciding motions for summary judgment. *See Cleveland*, 120 F.3d at 518-19. A comparison of the ADA and Social Security Act underscores the wisdom and flexibility of the Fifth Circuit's approach.

Title I of the ADA extends its protection only to "qualified individual[s] with a disability." *See* 42 U.S.C. § 12112(a). The same standard applies whether disparate treatment or failure to accommodate is alleged. A qualified individual is one who can perform the essential functions of her job with or without a reasonable accommodation. *See* 42 U.S.C. § 12111(8). If an individual's disability precludes her from working, as Cleveland and her doctors repeatedly described her status, she would not qualify for protection.

In comparison, the SSA utilizes a five step sequential process for determining benefits eligibility. First, it determines if the applicant is engaged in substantial gainful activity.[12] Second, it decides whether the applicant has a "severe impairment" that significantly limits her ability

[12] Applicants who are engaged in substantial gainful activity are not considered disabled regardless of their medical condition and, therefore, are not eligible for benefits. *See* 20 C.F.R. § 404.1520(b) (1998).

to perform work. *See* 20 C.F.R. § 404.1520(c) (1998). If the applicant has a severe impairment, the SSA determines whether the applicant satisfies the criteria for a listed impairment.[13] If so, the applicant is considered disabled without further inquiry. *See* 20 C.F.R. § 404.1520(d) (1998). If the applicant's severe impairment is not listed, the SSA determines whether the applicant is prevented from performing "past relevant work." *See* 20 C.F.R. § 404.1520(e) (1998). Finally, the SSA considers whether the applicant can perform work within the national economy based upon her age, education, functional capacity and past work experience. *See* 20 C.F.R. § 404.1520(f) (1998). Throughout the process, the SSA obtains written information from the applicant and her doctors.[14]

The Fifth Circuit's case-specific, rebuttable presumption/estoppel approach allows a court to determine if, in fact, statements to the SSA are inconsistent with, or complementary to, the "qualified individual" requirement of the ADA. For example, if the applicant represented only

[13] The SSA has determined that some conditions, such as amputation of certain limbs, total deafness or blindness, cerebral palsy and Down's Syndrome, are fully disabling and automatically entitle an individual to benefits. *See* 20 C.F.R. § 416.934 (1998).

[14] The disability determination process itself costs approximately $2.5 billion a year. The process relies on no fewer than four levels of administrative review at which different decision makers review claims pursuant to highly structured regulations. The extensive bureaucratic process provides an assurance that claims are rigorously screened. *See* Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans With Disabilities Act and Federal Disability Benefit Programs*, 76 Tex. L. Rev. 1003, 1016-17 (1998).

that she had a presumptive disability, such as blindness, she could still prove in her ADA suit that she was able to work with an accommodation. *See, e.g., Cleveland*, 120 F.3d at 517 (acknowledging that individuals with presumptive disabilities may still be able to work). An individual might also show she was receiving Social Security benefits while engaging in "trial work."[15] *Cleveland*, 120 F.3d at 518 (indicating that an applicant who is engaged in trial work could qualify for ADA protection). In addition, an individual could qualify her representations to the SSA, as did the plaintiff in *Talavera v. School Bd. of Palm Beach Cty.*, 129 F.3d 1214, 1215-16 (11th Cir. 1997), by specifically saying she could work with an accommodation. In each such instance, a plaintiff could rebut or explain why her SSA representations do not negate ADA protection.[16] *Cleveland*, 120 F.3d at 517-19.

The Fifth Circuit's "theoretically conceivable" language has been cited to show that the Court views with skepticism any SSA applicant's ability to prove she is a "qualified individual" under the ADA. *See Talavera*, 129 F.3d at 1219; Petitioner's Brief pp. 15, 23. That language,

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[15] Under its trial work program, the SSA continues to provide benefits to individuals who return to work for nine months. *See* 20 C.F.R. § 404.1592(a) (1998).

[16] This approach also addresses other potential situations raised by the United States in its brief. (*See* United States amicus brief pp. 14-15.) For example, if the receipt of benefits was remote in time, the presumption could be rebutted by changed circumstances because there would be no inconsistency and, therefore, no reason to invoke judicial estoppel.

however, does not narrow the holding or add a theoretically impossible barrier to ADA status. *See id.* In fact, in a footnote to the very sentence which contains this language, the Fifth Circuit cites cases which specifically hold that SSA determinations are not necessarily dispositive in ADA cases. *Cleveland*, 120 F.3d at 517 n.14. Moreover, in the text immediately following the "theoretically conceivable" reference, the Fifth Circuit outlines several specific circumstances where an SSA applicant/recipient could simultaneously be a "qualified individual with a disability" under the ADA. *Id.* at 517-18. These examples even mirror those cited by Cleveland and the United States in their discussions of why the SSA and ADA are complementary statutes, and why representations to the SSA of "disability" are not inconsistent with "qualified individual" status under the ADA. *See id.*; Petitioner's Brief pp. 29-30, 32-33; United States, et al. amicus brief pp. 10-16. The Fifth Circuit also acknowledges, with deference, the interpretive guidance documents and memoranda of the SSA. *Cleveland*, 120 F.3d at 517-18. Therefore, the Fifth Circuit's holding is appropriately broad to allow a fair review of a claimant's possible ADA status.

Overall, when properly applied, the Fifth Circuit's holding allows a Social Security applicant or recipient the opportunity to prove that her representations to the SSA are not inconsistent with the ADA's threshold requirement that she must be a "qualified individual with a disability" in order to seek its protection. Once that burden is met, the plaintiff's case would take the course of a traditional discrimination case. This approach is fair and grounded in common sense. It gives the proper weight to sworn representations, yet allows the ADA claimant the

opportunity to show why the sworn representations do not warrant application of judicial estoppel.

B. The Fifth Circuit's Use of Estoppel, Where Appropriate, as in this Case, Properly Binds Applicants to Their Sworn Representations.

By employing estoppel, the Fifth Circuit's holding appropriately recognizes the fundamental importance of truthful representations. *Cleveland*, 120 F.3d at 518 ("As her statements are unambiguous and previously uncontroverted, she cannot now be heard to complain that she could perform the essential functions of her job during the time between her return to work and her termination."). On the other hand, Cleveland and the various amici have taken an overly technical approach to the propriety of estoppel when a common sense view was intended by the Fifth Circuit. Judicial estoppel rests upon the very simple maxim of a "public policy which exalts the sanctity of the oath. The object is to safeguard the administration of justice by placing a restraint upon the tendency to reckless and false swearing and thereby preserve the public confidence in the purity and efficiency of judicial proceedings." *Melton v. Anderson*, 222 S.W.2d 666, 669 (Tenn. App. 1948). The doctrine is frequently invoked to prevent litigants from playing "fast and loose with the courts," an evil which the courts should not tolerate. *See, e.g., Scarano v. Central R.R.*, 203 F.2d 510, 513 (3d Cir. 1953); *Garcia-Paz v. Swift Textiles, Inc.*, 873 F.Supp. 547, 555-56 (D. Kan. 1995). As one court remarked, it prevents a litigant from "speak[ing] out of both sides of her mouth with equal vigor and credibility before [the] court." *See Reigel v. Kaiser Foundation Health Plan of N.C.*, 859 F.Supp.

963, 970 (E.D.N.C. 1994). In the context of the present case, no one can dispute that an applicant should be honest in her representations about her condition. *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 72 (2d Cir. 1997) ("To rule otherwise might leave the implication that someone who feels himself in need of further income is free to misrepresent important information to the Social Security Administration.")

Judicial estoppel is a doctrine based on fundamental fairness. Judicial estoppel applies when: 1) two different positions are taken by the same party; 2) the first position was taken in a judicial or quasi judicial administrative proceeding; 3) the party to be estopped intended for the trier of fact in the first proceeding to accept her position; and 4) the two positions are totally inconsistent.[17] *See Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 601-05 (9th Cir. 1996). This Court long ago recognized that estoppel may be appropriate if a party assumes a certain position in a legal proceeding, succeeds in maintaining that position, and later attempts to assume a contrary position. She may not, thereafter, assume a contrary position simply because her interests have changed, especially if it prejudices the other party. *Davis v. Wakelee*,

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[17] Some courts additionally require that the litigant be successful and obtain some benefit from the first proceeding. *See, e.g., United States v. McCaskey*, 9 F.3d 368, 379 (5th Cir. 1993), *cert. denied, McCaskey v. United States*, 511 U.S. 1042 (1994). In this case, Cleveland received Social Security disability benefits. Therefore, if this additional requirement applies, it has been satisfied. (J.A. 83-84).

156 U.S. 680, 689-91 (1895) (party cannot claim his former assertion false, even if the assertion was a mistake).[18]

An applicant for Social Security disability benefits who thereafter asserts an ADA claim potentially meets each requirement for judicial estoppel. The same individual is seeking both Social Security benefits and ADA damages. The proceeding before the SSA is quasi judicial. The applicant expects the SSA to accept her assertions and award her benefits. Finally, as the Fifth Circuit recognized, the statements are frequently, but not always,

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[18] The *Davis* case does not specify what type of estoppel was applied, but the elements are most similar to those of equitable estoppel.

Likewise, a majority of the Circuits recognize the propriety of judicial estoppel in a variety of circumstances. *See, e.g., United States v. Levasseur*, 846 F.2d 786, 792 (1st Cir.), *cert. denied, Levasseur v. United States*, 488 U.S. 844 (1988); *Bates v. Long Island Ry. Co.*, 997 F.2d 1028, 1038 (2d Cir.), *cert. denied*, 510 U.S. 992 (1993); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 359 (3d Cir. 1996); *Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996) *cert. denied sub nom, Lowery v. Redd*, ___ U.S. ___, 117 S. Ct. 954 (1997); *United States v. McCaskey*, 9 F.3d 368, 379 (5th Cir. 1993) *cert. denied, McCaskey v. United States*, 511 U.S. 1042 (1994); *Teledyne Indus., Inc. v. N.L.R.B.*, 911 F.2d 1214, 1217-18 (6th Cir. 1990); *Chaveriat v. Williams Pipeline Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993); *Hossaini v. Western Missouri Medical Ctr.*, 140 F.3d 1140, 1143 (8th Cir. 1998); *Johnson v. State of Oregon*, 141 F.3d 1361, 1369 (9th Cir. 1998); *DeShong v. Seaboard Coastline R.R. Co.*, 737 F.2d 1520, 1522 (11th Cir. 1984); *Jackson Jordan, Inc. v. Plasser American Corp.*, 747 F.2d 1567, 1579 (Fed. Cir. 1984).

Two of the Circuit Courts of Appeal do not utilize the doctrine of judicial estoppel under any circumstances. *See Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1330 (10th Cir. 1998); *Swanks v. Washington Metro. Area Transit Auth.*, 116 F.3d 582, 587 (D.C. Cir. 1997).

inconsistent. *Cleveland*, 120 F.3d at 517. If the inconsistency of the applicant's position can be explained and resolved, she can rebut the presumption and judicial estoppel will not prevent her from maintaining her ADA claim. *See id.* at 518. Such an approach is fair, reasonable and promotes the sound policy of judicial economy. Depending on the facts of a particular case, an SSA applicant/recipient who is a "qualified individual" may still pursue her ADA claim, while meritless cases can be resolved by summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. . . . ").

Courts have acknowledged the importance of sworn representations in subsequent civil actions through the use of judicial estoppel. For instance, applying estoppel in an ADEA case and affirming summary judgment for the employer, the Second Circuit observed that

> "the disability program under the Social Security Act is not another unemployment insurance scheme. The integrity of the program depends in large part on the truthfulness of those who apply under it. That is doubtless why they are asked to sign their applications under penalty of perjury, warning them that the consequences of making false statements and requiring them to affirm that the information they have provided is true."

Simon v. Safelite Glass Corp., 128 F.3d 68, 74 (2d Cir. 1997); *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 617-18 (3d Cir. 1996) (at the summary judgment stage, plaintiff was judicially estopped from establishing a prima facie case of

discrimination because of his prior unconditional assertions of disability); *Fleck v. K.D.I. Sylvan Pools, Inc.*, 981 F.2d 107, 121 (3d Cir. 1992), *cert. denied*, 507 U.S. 1005 (1993) (plaintiffs' previous representations judicially estop their subsequent claim because "they cannot assert a [present] position . . . inconsistent with the one they previously asserted.").

Similarly, other circuits have granted summary judgment for employers in ADA cases based upon the employee's prior inconsistent representations without specifically using an estoppel analysis. *See, e.g., Weigel v. Target Stores*, 122 F.3d 461, 468-69 (7th Cir. 1997) (summary judgment appropriate because plaintiff could not overcome her "repeated" representations that she was "wholly unable to work" and supporting physician's statement); *Dush v. Appleton Elec. Co.*, 124 F.3d 957, 963-64 (8th Cir. 1997) (affirming summary judgment because plaintiff was unable to establish the strong countervailing evidence necessary to overcome her previous assertions of total disability); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996) (court affirmed summary judgment because of plaintiff's prior representations of total disability with physician corroboration); *August v. Offices Unlimited, Inc.*, 981 F.2d 576, 584 (1st Cir. 1992) (explaining that plaintiff's previous concession that he was "totally disabled at all relevant times" bars him from "now establish[ing] that he was a qualified, disabled person.").

Courts that have been reluctant to apply judicial estoppel in the SSA/ADA context appear to have read too much into the various legal interpretations of "estoppel," thereby missing the fundamental, common sense

intent of the principle. Specifically, they have suggested that applying estoppel may create a per se rule which always bars an ADA claim following receipt of Social Security benefits. *See, e.g., Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 382 n. 4 (6th Cir. 1998), pet. for cert. filed 66 U.S.L.W. 3800 (Jun. 9, 1998, No. 97-1991); *Blanton v. Inco Alloys Intern.*, 123 F.3d 916, 917 (6th Cir. 1997) (both decisions implying that judicial estoppel creates a per se bar). That concern is misplaced and would, in fact, be contrary to the principles of judicial estoppel.

Under the Fifth Circuit's standard, judicial estoppel bars only an ADA suit when a claimant's representations to the SSA are inconsistent with the "qualified individual" requirement of the ADA, and the inconsistency is not explained or rebutted. *Cleveland*, 120 F.3d at 518-19. *Accord Simon v. Safelite Glass Corp.*, 128 F.3d 68, 73 (2d Cir. 1997) ("If the statements can be reconciled there is no occasion to apply an estoppel."); *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1422-23 (11th Cir. 1998) (Judicial estoppel did not bar ADA claim because assertions were not inconsistent). In Cleveland, the Fifth Circuit emphasized that its ruling was based on the unique facts of the case, and that it was not establishing a per se rule which would automatically find representations of total disability to the SSA as inherently inconsistent with "qualified individual" status under the ADA. *Cleveland*, 120 F.3d at 518-19.

C. As With Estoppel, a Rebuttable Presumption Appropriately Balances the Interests of the Disabled Individual, the Purposes of the ADA and the Social Security Act, and the Sanctity of the Oath.

A rebuttable presumption is consistent with, and works in harmony with, judicial estoppel. It allows a Social Security recipient to overcome the application of judicial estoppel by producing evidence that her positions before the SSA and those in her ADA suit are not inconsistent. *Cleveland*, 120 F.3d at 518-19. A rebuttable presumption is really nothing more than the right to assume something in the absence of an explanation. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509-11 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981). For example, the use of a rebuttable presumption was set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) and, subsequently, in *Burdine*, 450 U.S. at 254 and *St. Mary's Honor Center*, 509 U.S. at 507-08, 521. These cases discuss the framework for the allocation of the burden of production in certain types of employment discrimination cases. They show that application of a rebuttable presumption is a longstanding, highly efficient method of determining whether the parties can meet the legal elements of their particular case. *See Burdine*, 450 U.S. at 255 n.8 ("The word 'presumption' properly used refers only to a device for allocating the burden of production. [citations omitted]. . . . Usually, assessing the burden of production helps the judge determine whether the litigants have created an issue of fact to be decided by the jury.").

The Fifth Circuit's rebuttable presumption standard establishes a procedure through which district courts and appellate courts determine whether an ADA plaintiff can satisfy the threshold requirement of being a "qualified individual with a disability." In the present case, the Fifth Circuit applied the presumption in the context of, and in accordance with, summary judgment procedures. When an individual applies for and receives Social Security disability benefits by repeatedly making sworn representations of disability and a resulting inability to work, as did Cleveland, it is appropriate to presume initially that she cannot also simultaneously be a qualified individual with a disability. *See Simon v. Safelite Glass Corp.*, 128 F.3d 68, 74 (2d Cir. 1997) ("[T]he words 'unable to work' are not words of art susceptible of being misunderstood."). Under established legal principles, therefore, summary judgment should be granted in favor of the employer if the claimant cannot, after the opportunity to explain the appearance of an inconsistency, overcome the presumption. *Cleveland*, 123 F.3d at 518-19. This approach is not novel. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("[I]f the factual context renders respondents' claim implausible . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."). It accords the appropriate weight to an applicant's sworn representations, specifically on the "qualified individual" requirement of the ADA, but permits an opportunity to explain any inconsistency.

The Eighth Circuit applies a similar standard without specifically utilizing a presumption. In *Moore v. Payless Shoe Source*, the court held that " 'prior representations of

total disability carry sufficient weight to grant summary judgment against the [ADA] plaintiff' absent 'strong countervailing evidence that the employee is in fact qualified.' " 139 F.3d 1210, 1213 (8th Cir. 1998), pet. for cert. filed (Jul. 20, 1998, No. 98-5286) (*quoting Dush v. Appleton Elec. Co.*, 124 F.3d 957, 963 (8th Cir. 1997)). Under the Eighth Circuit's approach, the applicant's representations to the SSA are taken as true unless she can overcome, or rebut, those assertions with strong countervailing evidence. *Moore*, 139 F.3d at 1213; *Dush*, 124 F.3d at 963 (observing that, "[w]here, as here, the party opposing the motion has made sworn statements attesting to her total disability and has actually received payments as a result of her condition, the courts should carefully scrutinize the evidence she marshals in an attempt to show she is covered by the ADA. The burden faced by ADA claimants in this position is, by their own making, particularly cumbersome, for summary judgment should issue unless there is 'strong countervailing evidence that the employee . . . is, in fact, qualified.' ")

Thus, like the Fifth Circuit, the Eighth Circuit in effect uses a rebuttable presumption to consider the content and context of the plaintiff's assertions. Doing so allows the plaintiff the opportunity to prove that she is a qualified individual with a disability, but also gives credence to the reasonable and logical meaning of her prior representations. *See id.*; *Cleveland*, 120 F.3d at 518-19. As with the estoppel theory, this approach contemplates and, in fact, provides a method in the appropriate case for addressing the concern that "disabled" means different things under the ADA and the Social Security Act. If, in fact, the plaintiff is entitled to the protection of both

statutes, the standards of the Fifth and Eighth Circuits provide the plaintiff with an opportunity to explain how and why.

As the Fifth Circuit observed, it is inconsistent for an individual to claim that she is disabled and unable to work to obtain Social Security disability benefits, yet able to perform the essential functions of her job. *Cleveland*, 120 F.3d at 516. While Cleveland and her supporting amici acknowledge that the applicant has sworn that she is totally disabled and unable to work, they contend that is not what she meant to say.[19] Specifically, they argue that, because the SSA does not consider "reasonable accommodation," the applicant's sworn representations of total disability are not inconsistent with an ADA claim. That contention is misplaced. It is the applicant's sworn representations, not what the SSA ultimately does with the information, that create the inconsistency.[20] As the Third Circuit observed, "[w]hatever the Social Security Administration's criteria for eligibility for disability benefits, the fact remains that McNemar told the U.S. government . . . under penalty of perjury that he was physically

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[19] Petitioner concedes that the inconsistency "appears obvious when comparing an individual's declaration to the SSA that they are 'disabled and unable to work' with the same individual's claim in an ADA case that they are 'disabled' and 'able to work.' " Petitioner's Brief p. 26.

[20] The EEOC and SSA are each charged with implementing their respective programs. Therefore, if the SSA concludes that it would be too difficult to consider reasonable accommodation in its disability determination, the court should defer to that decision. It is, however, the court's responsibility to protect the integrity of the judicial system and determine what effect sworn prior representations have on an ADA lawsuit.

unable to work. . . . " *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 620 (3d Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 958 (1997). Through the Fifth Circuit's flexible standard, however, the ADA claimant is not automatically barred from being a "qualified individual" despite her inconsistent positions. She is allowed the opportunity to explain the inconsistency. If there is no explanation, or an inadequate one, the claimant should not be allowed to maintain her ADA claim.

D. The Clear Statutory Language Must Control the ADA's Application in the Absence of Specific Legislative Intent.

Much has been surmised about legislative intent.[21] While Petitioner and her supporting amici repeatedly tout the broad sweeping goals of the ADA, they ignore the actual wording of the statute. *See Dush*, 124 F.3d at 961 ("When interpreting remedial statutes . . . it is invariably necessary to temper generalized recitations of legislative purpose with the precise language used to define a law's parameters."); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) ("[T]he starting point in every case involving construction of a statute is the language itself."). What is clear from the plain language of the ADA is that it does not apply to every disabled person. *See* 42 U.S.C § 12111(8). It simply was not intended to cover disabled

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[21] *See, e.g.*, Petitioner's Brief pp. 22-25; United States, et al. amicus brief p. 15. The fact is that the Social Security Act was scarcely mentioned when the ADA was being considered and finally adopted. Diller, *supra* note 14 at 1031 ("The interaction between the ADA and the disability benefit programs was barely addressed at the time the ADA was enacted.").

individuals who cannot work. *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 618 (3d Cir. 1996), *cert. denied*. ___ U.S. ___, 117 S. Ct. 958 (1997) ("A person unable to work is not intended to be, and is not, covered by the ADA."). Rather, the statute applies only to those individuals who have a qualifying disability and who can perform the essential functions of their jobs with or without reasonable accommodation. *See* 42 U.S.C. §§ 12102(2), 12111(8). A plaintiff must, therefore, prove as a part of her prima facie case that she is within the class of individuals to be protected.

No one disputes that the ADA is a worthy statute designed to eliminate discrimination against the disabled. "Nevertheless, a court of law must venture beyond such sweeping abstractions and ask various questions which, without a doubt, will fail to produce the sort of emotional thunder often engendered by broadly worded statements of remedial intent, but which are indispensable to a meaningful application of the statute." *Dush*, 124 F.3d at 961. The relevant statutory inquiry in this case, therefore, is who are the intended beneficiaries of the ADA. *Id.* "As is usually so, Congress has provided the answer in the language of the statute itself: The ADA was designed to prevent an employer from discriminating against 'a qualified individual with a disability . . . who, with or without reasonable accommodation, can perform the essential functions of the employment position'. . . . " *Id. quoting* 42 U.S.C. §§ 12111(8), 12112(a). Clearly, only some (and not all), disabled individuals are entitled to ADA protection.

Despite the language of the statute, the D.C. Circuit proclaims Congress did not intend for disabled persons to choose between Social Security disability benefits and the ADA. *See Swanks v. Washington Metro. Area Transit*

Auth., 116 F.3d 582, 586 (D.C. Cir. 1997). Cleveland and the United States make the same argument. Petitioner's Brief p. 24; United States amicus brief p. 15. Although their rationale for this result is "legislative intent," Congress was actually silent on this point. *McNemar*, 91 F.3d at 619 (approving the lower court's explanation that "[t]here is no indication that either the United States Congress . . . intended to provide disability benefits to persons capable of obtaining gainful employment, and it is the province of the legislature rather than this court to authorize such a double recovery."). If Congress did not mean what it said – that to be a qualified individual with a disability requires the individual to be able to perform the essential functions of her job with or without a reasonable accommodation – then Congress, not the courts, should revise the ADA, the Social Security Act or both.[22]

The courts and commentators[23] speculating about legislative intent are also concerned about the establishment of a standard by which an individual who is disabled under the Social Security framework, but who is also able to perform the essential functions of her job, is

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[22] 142 Cong. Rec. 58472 (daily ed. July 22, 1996) (statement by Senator Jeffords) (stating that the ADA and the disability benefit programs make up a "schizophrenic national disability policy" because of a lack of an integration with the Social Security Disability Insurance and SSI programs).

[23] *See, e.g., Swanks*, 116 F.3d at 584-86; Diller, *supra* note 14 at 1017-19.

required to elect between pursuing social security benefits and ADA benefits. The Fifth Circuit's approach addresses this concern. In fact, *Cleveland* specifically acknowledged a number of situations similar to those described by Petitioner and the United States, where a Social Security applicant/recipient would also be a qualified individual with a disability. In those situations, applying the Fifth Circuit's flexible rebuttable presumption analysis, the applicant/recipient can still show that judicial estoppel and, consequently, summary judgment is not appropriate. There is no implicit requirement in *Cleveland* that an individual must choose either the Social Security Act or the ADA and may not pursue both. By using a presumption/estoppel analysis, which in turn requires the court to review the surrounding facts and circumstances of each case, the individual's rights, as well as the integrity of the statutes and the judicial process, are protected.[24]

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[24] The present facts are not analogous to those in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). Under the ADA, a person who is not qualified to perform the essential functions of her job is not protected from discrimination. If a person is not in a protected class, there is no unlawful discrimination and no liability. Thus, the relevant question is whether the applicant can establish a prima facie case of discrimination. If she cannot, the employer has no obligation to articulate legitimate business reasons for its decision. *See McNemar*, 91 F.3d at 620-21.

II. If the Application for, or Receipt of, Disability Benefits Does Not Create a Rebuttable Presumption of Judicial Estoppel, the Representations an Applicant Makes to the Social Security Administration are Nonetheless Material, Relevant and Often Dispositive of Whether She is Simultaneously a "Qualified Individual with a Disability."

If the application for, or receipt of, Social Security disability benefits does not create a rebuttable presumption of judicial estoppel, an applicant's representations to the SSA are fully admissible and, as here, can be dispositive of whether the Social Security applicant is a "qualified individual" under the ADA.[25] This standard is essentially the same as that advocated by Cleveland and the United States. Petitioner's Brief p. 19; United States, et al. amicus brief p. 6. In this case, the clear, consistent, uncontroverted representations of Cleveland and her doctors demonstrate that summary judgment was appropriate.

Only three positions are possible regarding the effect of the application for, or receipt of, Social Security benefits on a claimant's ability to assert that she is a "qualified individual with a disability" under the ADA. SSA applicants/recipients 1) will always be barred or 2) will never be barred or 3) may sometimes be barred. Respondent does not advocate a per se bar. At the same time, none of the parties, amici, or circuit courts that have addressed the issue, including the Fifth Circuit, contend there can **never** be a bar. *See Cleveland*, 120 F.3d at 517; Petitioner's

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[25] *See, e.g., Moore v. Payless Shoe Source, Inc.*, 139 F.3d 1210 (8th Cir. 1998), pet. for cert. filed (Jul. 20, 1998, No. 98-5286).

Brief p. 19; United States, et al. amicus brief p. 6. Therefore, the issue before this Court is not whether to adopt one extreme or the other, but rather under what circumstances a bar exists, as a matter of law, to claiming ADA "qualified individual" status despite SSA representations.

Indeed, as the United States, et al. acknowledge, "[i]n certain cases . . . an applicant for disability benefits may make specific factual statements concerning her functional capacities. In some of those cases, there may be an inconsistency between those factual statements and her later statements in support of an ADA claim. In that case, the prior statements to the SSA may be relevant to the qualification issue in the ADA action and may lead to a determination that relief under the ADA is not available or should be limited." United States, et al. amicus brief p. 6.

Whether a court applies a rebuttable presumption approach or simply analyzes the facts under a traditional summary judgment standard, the result will be the same as that advanced by both Respondent and the United States. In the appropriate case, such as *Cleveland*, the SSA representations will be sufficiently unambiguous and uncontroverted to preclude the claimant from being a "qualified individual with a disability" under the ADA. In other cases, the SSA representations are, at a minimum, evidence to be considered by the trier of fact. Cleveland's prior statements, made not once, not twice, but repeatedly and in her own words, and corroborated by her doctors, confirm, as a matter of law, that relief under the ADA is not available to Cleveland and that summary judgment was appropriate.

This position is not at all controversial. In fact, the relevance of SSA representations, and the potentially dispositive nature thereof, has been acknowledged by Petitioner and the United States as being appropriate in "certain cases." *See* Petitioner's brief p. 19; United States et al. amicus brief p. 6. Moreover, it is consistent with the view of every circuit that has considered the issue.[26] As noted previously, courts uniformly hold that the representations a claimant makes in order to receive disability benefits are relevant, material evidence in determining whether the claimant can establish a prima facie case under the ADA. *See Moore v. Payless Shoe Source, Inc.* 139 F.3d 1210, 1213 (8th Cir. 1998), pet. for cert. filed (Jul. 20, 1998, No. 98-5286) ("[P]rior representations of total disability carry sufficient weight to grant summary judgment against the [ADA] plaintiff absent strong countervailing evidence that the employee is in fact qualified."); *August v. Offices Unlimited, Inc.*, 981 F.2d 576, 579-81 (1st Cir. 1992) (Without specifically using judicial

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[26] *See, e.g., August v. Offices Unlimited, Inc.*, 981 F.2d 576, 581 (1st Cir. 1992); *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 620 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997); *Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513, 518 (5th Cir. 1997); *Griffith v. Wal-Mart Stores*, 135 F.3d 376, 383 (6th Cir. 1998); *Weigel v. Target Stores*, 122 F.3d 461, 467-68 (7th Cir. 1997); *Dush v. Appleton Electric Co.*, 124 F.3d 957, 963 (8th Cir. 1997); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1332 (10th Cir. 1998); *Talavera v. School Bd. of Palm Beach Cty.*, 129 F.3d 1214, 1220 (11th Cir. 1997); *Swanks v. Washington Metropolitan Transit Authority*, 116 F.3d 582, 587 (D.C. Cir. 1997); *see also Simon v. Safelite Glass Corp.*, 128 F.3d 68 (2d Cir. 1997) (acknowledging the importance of a claimant's representations to the SSA in an ADEA claim).

estoppel, the court upheld summary judgment because the claimant stated he was disabled and unable to work before he requested accommodation.).

Similar to the other cases Petitioner and the United States cite with approval, *Swanks v. Washington Metropolitan Transit Authority*, 116 F.3d 582 (D.C. Cir. 1997), acknowledges that statements supporting disability claims are relevant in ADA suits. Summary judgment in that case was not affirmed because of a lack of evidence:

> The conclusion we reach today does not mean that claimants' statements in support of disability claims are never relevant in ADA suits. . . . Here, however, the record contains no evidence of Swanks' position before the Social Security Administration; we know nothing about what he said in his application for Social Security disability benefits, what evidence he provided to support his claim, or what statements he or any of his witnesses made in the course of the proceedings.

Id. at 587.

Since the *Swanks* court did not have enough facts to determine the existence of inconsistent statements, let alone the nature of any such statements, it could not reasonably and responsibly uphold summary judgment. *Swanks* also cited with approval *Pyramid Securities, Ltd. v. IB. Resolution, Inc.*, 924 F.2d 1114, 1123 (D.C. Cir.), *cert. denied*, 502 U.S. 822 (1991), which held "that parties' prior sworn statements must be given 'controlling weight' at summary judgment unless 'the shifting party can offer

persuasive reasons for believing the supposed correction.' " *See Swanks,* 116 F.3d at 587. Thus, under the D.C. Circuit's analysis, Cleveland's sworn representations would be given "controlling weight" and she would be required to offer persuasive proof that what she told the SSA was not mutually exclusive, and legally fatal, to her ADA claim.

The facts bear stating one last time. Cleveland repeatedly and unambiguously represented to the SSA that she became "unable to work on January 7, 1994," and that she was "disabled." (J.A. 20-24). She said: "I had a stroke in January 1994; I went back to work but I couldn't work." (J.A. 57). She said on at least four occasions that she could not do her job **because of** her disability. (J.A. 47, 57, 73-74, 79). Her medical providers stated she was "100% disabled" and "permanently and completely disabled from any productive work." (J.A. 45, 71-72). Cleveland made consistent, unambiguous representations under penalty of perjury that she was disabled and unable to work beginning January 7, 1994. (J.A. 20-24, 47, 57); *Cleveland,* 120 F.3d at 518. She never told the SSA her disability began, or grew worse, after her termination from PMSC. (J.A. 20-24, 47, 57). As a result, an administrative law judge found Cleveland became disabled beginning January 7, 1994 and awarded Social Security disability benefits retroactive to that date. (J.A. 83-84); *Cleveland,* 120 F.3d at 515.

These were Cleveland's own words, or the words of her doctors, that she provided to the SSA to get benefits. Contrary to the contentions of the Petitioner and the United States, et al., she did not simply check boxes on computerized forms or use the SSA's mandatory catch

phrases. These individual specific representations mandated summary judgment under a traditional factual analysis and the application of existing law. *Cleveland* is one of those "certain cases" that should "lead to a determination that relief under the ADA is not available. . . . " United States, et al amicus brief p. 6. Accordingly, summary judgment was appropriate and the Fifth Circuit's ruling should be affirmed.

CONCLUSION

As the Fifth Circuit held, Cleveland's representations to the SSA created a rebuttable presumption that she was judicially estopped from claiming she was a "qualified individual with a disability." Cleveland failed to overcome that presumption with her summary judgment proof. Alternatively, under a traditional summary judgment analysis, Cleveland's prior representations provide the evidence which, given the absence of an adequate explanation in the form of competent, contraverting evidence, shows as a matter of law that Cleveland cannot establish a prima facie case under the ADA. Under either

rationale, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

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OCTOBER TERM, 1998

CAROLYN C. CLEVELAND, PETITIONER

v.

POLICY MANAGEMENT SYSTEMS CORP., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the application for or receipt of disability insurance benefits under the Social Security Act, 42 U.S.C. 423 (1994 & Supp. II 1996), creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111(8).

2. If it does not create a presumption, what weight, if any, should be given to the application for, or receipt of, disability insurance benefits when a person asserts she is a "qualified individual with a disability" under the ADA?

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1008

CAROLYN C. CLEVELAND, PETITIONER

v.

POLICY MANAGEMENT SYSTEMS CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICI CURIAE

This case concerns the appropriate impact of an employee's application for or receipt of disability insurance benefits under the Social Security Act, 42 U.S.C. 423 (1994 & Supp. II 1996), on the employee's suit against her employer alleging that the employer discharged her in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* The Equal Employment Opportunity Commission (EEOC) is authorized to issue regulations to carry out Title I of the ADA and to enforce it with respect to private employers. 42 U.S.C. 12116, 12117(a). The Attorney General enforces Title I of the ADA with respect to public employers. 42 U.S.C. 12117(a). The Social Security Administration (SSA) administers the disability standards of the Social Security Act. 42 U.S.C. 901. While the petition for certiorari in this case was pending, the United States sub-

mitted a brief as amicus curiae in response to an order of this Court inviting its views.

STATEMENT

1. Petitioner Carolyn Cleveland began working for respondent Policy Management Systems Corporation in August 1993. Pet. App. 2a. Petitioner suffered a stroke in January 1994 and took a leave of absence from work. *Ibid.* On January 26, 1994, she signed an application for Social Security disability benefits prepared by her daughter in which she certified, using the standard language on forms generated by SSA's computerized application system, that she was "'unable to work because of [her] disabling condition on January 7, 1994' and that she was 'still disabled.'" *Ibid.* (quoting application).

In April 1994, petitioner's physician released her to return to work. Pet. App. 2a. Petitioner resumed her job with respondent and notified the SSA of the change in her condition. *Id.* at 2a-3a. The SSA subsequently confirmed that petitioner would not be entitled to benefits because she had returned to work full time and was earning more than $500 a month. See J.A. 38-39.

Petitioner encountered difficulties performing her job on her return to work and asked for several accommodations that would assist her in performing the essential functions of the job. Pet. App. at 3a. Respondent denied all of petitioner's requested accommodations and, in July 1994, terminated her employment. *Ibid.*

On September 14, petitioner renewed her application for Social Security disability benefits by filing a "Request for Reconsideration." Pet. App. 3a. Again using the standard language contained on forms generated by the SSA, petitioner represented that she "continue[d] to be disabled." *Ibid.* (quoting Request for Reconsideration). Petitioner also stated that her employer discharged her because she "could no longer do the job because of [her] condition." *Ibid.*

(quoting Work Activity Report submitted in conjunction with Request for Reconsideration). Petitioner filed a second Request for Reconsideration in January 1995, reaffirming that she was "unable to work," *ibid.*, again using the standard language in SSA forms.

Petitioner made no statement about her ability to perform her prior job with reasonable accommodations in any of her submissions to the SSA, and she was not asked to make such a statement. The matter was subsequently referred to an administrative law judge (ALJ), who, in September 1995, awarded petitioner disability benefits effective retroactively to January 7, 1994. Pet. App. 3a.

2. One week before the ALJ's decision, petitioner brought suit under the ADA. Pet. App. 3a-4a. She claimed that respondent terminated her employment because of her disability. Compl. ¶ 7. Petitioner further alleged that respondent unlawfully failed to accommodate her disability. *Ibid.*

Respondent moved for partial summary judgment, arguing that "[petitioner] could not establish a prima facie case under the ADA, as her representations in her application for, and her receipt of, social security disability benefits estopped her from claiming that she is a 'qualified individual with a disability.'" Pet. App. 4a. In response to the motion, petitioner submitted an affidavit detailing various accommodations that she had requested. See J.A. 95-98. The affidavit alleged that all of the accommodations were denied and that petitioner's condition worsened as a consequence of her firing. *Ibid.* Petitioner also submitted an affidavit from her physician stating, "[p]rior to [petitioner's] termination, I had anticipated that [she] would ultimately reach a near 100% recovery" but, following her termination, "she became depressed and her aphasia became worse." J.A. 100-101. Petitioner's physician opined that "had [petitioner] been given training, time and assistance on the job, instead of being terminated, she would have continued to recover from

the stroke." J.A. 101. The district court granted partial summary judgment for respondent. Pet. App. 4a.

3. On appeal, the Fifth Circuit affirmed. Pet. App. 1a-13a. The court first rejected "a per se rule that automatically estops an applicant for or recipient of social security disability benefits from asserting a claim of discrimination under the ADA." *Id.* at 8a. The court recognized that, because of the different legal standards involved, claims under the Social Security Act and the ADA "would not necessarily be mutually exclusive." *Id.* at 9a. The court nonetheless adopted a rule that calls for the application of estoppel in the vast majority of cases in which an individual applies for or receives social security disability benefits. *Id.* at 11a-12a.

Specifically, the court ruled that "the application for or the receipt of Social Security disability benefits creates a *rebuttable* presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.'" Pet App. 11a. The court opined that an individual would be able to overcome that presumption, if at all, only "under some limited and highly unusual set of circumstances." *Id.* at 9a. Applying that standard, the court ruled that petitioner had not "raised a genuine issue of material fact to rebut the presumption that, while she remains disabled for purposes of Social Security, she is estopped from asserting that she is a 'qualified individual with a disability.'" *Id.* at 12a.

Petitioner sought rehearing. The EEOC filed a brief as *amicus curiae* in her support. Pet. App. 18a-35a. The panel denied the petition for rehearing without explanation. *Id.* at 16a-17a.

SUMMARY OF ARGUMENT

Neither application for nor receipt of Social Security disability benefits warrants a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" (42 U.S.C. 12111(8)) under the ADA. A person may have a medical condition that entitles her to disability benefits under the Social Security Act and nevertheless be a qualified individual with a disability under the ADA for several reasons. First, an individual is "qualified" under the ADA if she could perform the essential functions of her job with "reasonable accommodation." *Ibid.* In contrast, a person may be entitled to benefits under the Social Security Act even if she could have performed her prior job with reasonable accommodation, because the SSA does not speculate whether the ADA might require an employer to make specific accommodations that the employer has not in fact made. Second, a person may qualify for Social Security disability benefits based on one of a series of regulatory presumptions that she is unable to work, even though the person is not actually prevented by her impairment from performing all jobs. In contrast, presumptions play no part in the ADA qualification analysis. Third, the Social Security Act permits recipients to receive benefits in certain circumstances even though they are employed in order to encourage recipients to return to work if possible. Finally, disability status may change over time, so that a person who was discharged in violation of the ADA because she was able to work at that time may become progressively more disabled and then properly apply for and receive disability benefits.

Because there is no necessary inconsistency between receipt of or application for Social Security disability benefits and status as a "qualified individual with a disability" under the ADA, there is no justification to presume that a benefit applicant or recipient is judicially estopped from asserting that she is "qualified" under the ADA. Indeed, the use of judicial estoppel to bar ADA actions would frustrate the purposes of both the ADA and the disability provisions of the Social Security Act. Social Security benefits and the ADA are not necessarily alternative remedies between which people with disabilities must choose. Rather, they are

complementary measures that provide financial support to people with physical or mental impairments who face practical barriers to work while at the same time encouraging and facilitating their efforts to move off the benefit rolls and to return to work.

Statements made in connection with a benefits application, where relevant, should be considered as evidence in a subsequent ADA action, but they should not trigger either a per se bar to the ADA suit or a heightened evidentiary burden on the plaintiff. General statements invoking the standard language of SSA benefit applications that the claimant is "unable to work" or "disabled" have little, if any, relevance to the issue of qualification in an ADA action, because the connotations of those terms under the Social Security Act are quite different from their meanings under the ADA. In certain cases, however, an applicant for disability benefits may make specific factual statements concerning her functional capacities. In some of those cases, there may be an inconsistency between those factual statements and her later statements in support of an ADA claim. In that case, the prior statements to the SSA may be relevant to the qualification issue in the ADA action and may lead to a determination that relief under the ADA is not available or should be limited.

ARGUMENT

I. NEITHER APPLICATION FOR NOR RECEIPT OF DISABILITY INSURANCE BENEFITS UNDER THE SOCIAL SECURITY ACT CREATES A REBUTTABLE PRESUMPTION THAT THE APPLICANT OR RECIPIENT IS JUDICIALLY ESTOPPED FROM ASSERTING THAT SHE IS A "QUALIFIED INDIVIDUAL WITH A DISABILITY" UNDER THE ADA

A person may have a medical condition that entitles her to disability benefits under the Social Security Act and also be a qualified individual with a disability under the ADA. The

court of appeals acknowledged that fact (Pet. App. 10a-11a) but considered it only "theoretically conceivable that under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive" (*id.* at 8a-9a). The court therefore held that petitioner's application for and receipt of Social Security disability benefits created a rebuttable presumption that she was estopped from asserting that she is a qualified individual under the ADA and that petitioner failed to rebut that presumption. The court of appeals erred because the situation in which a person is both eligible for Social Security disability benefits and "qualified" under the ADA is neither theoretical nor unusual. Moreover, because "disability" and "inability to work" have substantially different meanings under the Social Security Act and under the ADA, petitioner's assertions to the SSA that she was "disabled" and "unable to work" within the meaning of the Social Security Act are in no way inconsistent with her ADA claim. The court of appeals mistakenly viewed Social Security disability benefits and the ADA as alternative remedies between which a disabled person must ordinarily choose, rather than complementary mechanisms that provide financial support for disabled people and facilitate their return to work.

A. A Claim For Social Security Disability Benefits Is Not Inconsistent With A Valid ADA Claim

The ADA was enacted in 1990 to eradicate widespread discrimination against individuals with disabilities and, among other things, to enable disabled people to move off government benefit rolls and to return to work. See 42 U.S.C. 12101; H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 32-34 (1990) (1990 House Report). To that end, the ADA prohibits employers from discriminating against a "qualified individual with a disability" because of the disability. 42 U.S.C. 12112(a). A "qualified individual with a disability" is "an individual with a disability who, with or without rea-

sonable accommodation, can perform the essential functions" of his job. 42 U.S.C. 12111(8). Reasonable accommodations may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations." 42 U.S.C. 12111(9)(B).

The disability provisions of the Social Security Act are designed to provide certain disabled individuals with benefits that, although not based on need, are intended to compensate them for lost income or to protect them from indigence. See, *e.g.*, H.R. Rep. No. 1189, 84th Cong., 1st Sess. 4-5 (1955) (1955 House Report); *Mathews* v. *Eldridge*, 424 U.S. 319, 340-341 & n.24 (1976). The Act provides that an insured individual has a "disability" and is entitled to benefits if he is unable to engage in "substantial gainful activity" because of a "physical or mental impairment" that is expected to result in death or that has lasted or can be expected to last for 12 months or more. 42 U.S.C. 423(a)(1)(D), 423(d)(1)(A). The impairment must be "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A).[1]

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[1] The citations and discussion in this brief relate to the Social Security Disability Insurance program (SSDI), authorized by Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, the program for which petitioner applied and was found eligible. That program provides benefits to disabled workers, their dependents, and their widows or widowers for workers insured under the program. Title XVI of the Social Security Act authorizes the Supplemental Security Income program (SSI), 42 U.S.C. 1381 *et seq.*, which provides benefits to disabled individuals whose incomes and assets fall below a specified level. Although the eligibility criteria under the two programs differ in some respects (primarily in that SSI is need-based and SSDI is insurance-based), the basic statutory definitions of disability for adults under the two programs are the same. See *Bowen* v. *Yuckert*, 482 U.S. 137, 140 (1987). Most of the reasoning in this brief applies equally to both programs, and under neither program should application for or receipt of benefits estop the applicant or recipient from suing under the ADA.

The SSA applies a five-step process to determine whether an adult claimant qualifies for benefits. See *Bowen* v. *Yuckert*, 482 U.S. 137, 140-142 (1987). First, the claimant must not be engaged in "substantial gainful activity." 20 C.F.R. 404.1520(b). Second, the claimant must have a medical impairment that is severe enough to limit significantly his ability to do basic work activities. 20 C.F.R. 404.1520(c), 404.1521. Third, if the impairment is the same as, or equivalent to, one of the impairments listed by the Secretary at 20 C.F.R. Part 404, Subpart P, Appendix 1, benefits are awarded without further inquiry into the claimant's actual ability to work. 20 C.F.R. 404.1520(d), 404.1525, 404.1526; see also *Yuckert*, 482 U.S. at 153; *Heckler* v. *Campbell*, 461 U.S. 458, 460 (1983). Fourth, if the claimant's impairment does not meet or equal one on the list, the claimant must be unable to perform his "*past relevant work*," see 20 C.F.R. 404.1520(e); and, fifth, he must be unable to perform other work that exists in significant numbers in the national economy, considering his age, education, and work experience, see 20 C.F.R. 404.1520(f), 404.1560(c).

Given the different but complementary statutory schemes, application for and receipt of Social Security disability benefits are often fully consistent with a valid ADA claim. First, a person is a "qualified individual with a disability" under the ADA if he could perform the essential functions of his job if his employer made reasonable accommodations, but he may nonetheless be eligible for Social Security disability benefits if his employer has not made those accommodations. Second, a person may qualify for disability benefits based on one of several presumptions adopted by the SSA about the effect of certain physical

conditions and other characteristics on ability to work, but presumptions play no part in determining whether a person is "qualified" under the ADA. Third, in certain circumstances, a disability beneficiary may continue to receive benefits under the Social Security Act even though he is able to work. Finally, disability status may change over time, so that an individual may be able to work when he is terminated in violation of the ADA but become unable to work so that he later properly applies for and receives disability benefits.

1. As the EEOC has explained, the ADA's definition of the term "qualified individual with a disability" expressly requires consideration whether a person could perform the essential functions of his job *with reasonable accommodation*. See 42 U.S.C. 12111(8); 29 C.F.R. 1630.2(m); *EEOC: Benefits Applications and ADA Claims* (Feb. 12, 1997), *reprinted in* Bureau of Nat'l Affairs, Inc., *Americans with Disabilities Act Manual* (*EEOC Guidance*), No. 62, at 70:1255 (1997). In contrast, neither the Social Security Act nor its implementing regulations preclude award of disability benefits because the claimant could have performed his prior job if his employer had made reasonable accommodations or because he might be able to perform other jobs if other employers made such accommodations. See Memorandum from Daniel L. Skoler, Assoc. Comm'r for Hearings and Appeals, SSA, to Administrative Appeals Judges (June 2, 1993), *reprinted in* 2 *Social Security Practice Guide* (*SSA Guidance*), App. § 15C[9], at 15-401 to 15-402 (1997), cited in U.S. Amicus Br. at 8, in *Swanks* v. *Washington Metro. Area Transit Auth.*, No. 96-7078 (D.C. Cir.) (*Swanks* Br.), *reprinted at* Pet. App. 43a-44a.

The Social Security Act requires consideration of a claimant's ability to do "his previous work." 42 U.S.C. 423(d)(2)(A). It does not require consideration of his ability to perform his prior job with a possible ADA-mandated accommodation that the employer, in fact, never provided. See

SSA Guidance at 15-401. Similarly, the Act requires consideration whether a claimant is able to do other work that "exists" in the national economy. 42 U.S.C. 423(d)(2)(A). It does not require consideration whether he could do jobs as they might be modified by reasonable accommodations that the ADA might require but that employers have not actually made. See *SSA Guidance* at 15-401.

Thus, when the SSA, in step four of the sequential evaluation process, considers whether an individual can perform his "*past relevant work*," the SSA does not consider potential accommodations that the employer did not actually make. *SSA Guidance* at 15-401. Nor does the SSA speculate whether employers might be required by the ADA to make specific accommodations, when, at step five, the SSA determines whether the claimant could perform other work that exists in significant numbers in the national economy. *Id.* at 15-401 to 15-402.

That practice advances the Social Security Act's purposes to compensate disabled individuals for lost income and to protect them from indigence. If the SSA denied benefits to a disabled individual based on speculation that he would prevail in an ADA suit, he would be deprived of financial support for the lengthy period until the suit was resolved. Moreover, because the reasonable-accommodation inquiry is intensely fact specific, and the SSA has no special expertise in applying the ADA, the SSA's speculation might well prove incorrect, in which case the claimant would have been improperly denied benefits.[2] Finally, providing benefits to a disabled person who might be able to return to work if he prevailed in an ADA suit advances the common goal of the

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[2] In addition, speculation about a highly fact-specific issue on which the SSA has no special expertise would risk drawing the agency into long evidentiary disputes that would consume government resources and impair the efficiency of the disability program. *Cf. Schweiker* v. *Gray Panthers*, 453 U.S. 34, 48 (1981); *Weinberger* v. *Salfi*, 422 U.S. 749, 782-785 (1975); see also *Eldridge*, 424 U.S. at 347-348.

Social Security Act and the ADA to facilitate the return of people with disabilities to the work force, see pp. 14-15, *infra*, by providing vital financial support while the person pursues his remedy under the ADA.

Many ADA cases, including this one, turn on disputes over reasonable accommodations rather than whether the plaintiffs could work without any accommodations. Any such case is potentially one in which the employee is eligible for disability benefits under the Social Security Act but able to work with reasonable accommodation under the ADA.

2. Another significant difference between the two statutory schemes is that someone may qualify for disability benefits based on one of several generalized presumptions about his inability to work, but the determination whether someone is "qualified" under the ADA must always be an individualized one. See *Yuckert*, 482 U.S. at 153; *Campbell*, 461 U.S. at 460; *EEOC Guidance* at 70:1251, 70:1255. Because of the use by the SSA of generalized presumptions, a finding that a person is disabled for purposes of Social Security benefits does not mean that there is no job that he can perform. For example, at step three of the Social Security determination process, an individual with an impairment listed in the regulations (such as blindness) is conclusively presumed to be "disabled" and "unable to work" without any inquiry into his ability to do his past work or other work that exists in the national economy (and even though many people with that impairment may in fact be working). See 20 C.F.R. 404.1520(d), 404.1525, 404.1526; *Swanks* Br., Pet. App. 39a, 44a-45a; see also *Whitbeck* v. *Vital Signs, Inc.*, 116 F.3d 588, 591 (D.C. Cir. 1997). Similarly, at step five of the determination process, the SSA may award benefits to someone who can perform a broad range of jobs (involving sedentary, light, or even medium work), based on a presumption that his age, education, or lack of transferrable skills from past employment make it

unlikely that he could adjust to other work. See generally *Campbell*, 461 U.S. at 460-462.

The SSA relies to some extent on generalized presumptions in order to ensure uniformity and efficiency in determining eligibility for disability benefits. See *Yuckert*, 482 U.S. at 153; *Campbell*, 461 U.S. at 461, 468. Efficiency is important to the ability of the disability program to fulfill its mission. Disability benefits enable recipients to sustain themselves while they pursue other remedies that may be available, such as the right to require their employers to make reasonable accommodations under the ADA. Any delay in eligibility determinations thus risks material harm to applicants.

Efficiency is also vital given the volume of benefit applications processed by the SSA. As this Court has noted, the Social Security hearing system is probably the largest adjudicative agency in the world. See *Campbell*, 461 U.S. at 461 n.2. The SSA estimates that it received more than 2.5 million claims for disability benefits in 1997 and conducted nearly 700,000 reviews of the disability status of existing recipients. See Social Security Admin., *Disabled Workers Beneficiary Statistics* 2 (July 2, 1998); Social Security Admin., *Annual Report of the Supplemental Security Income Program* 25 (May 1998); Social Security Admin., *Annual Report of Continuing Disability Reviews* 4 (Aug. 1998). Thus, as this Court has repeatedly recognized, some reliance on general rules is essential. See *Yuckert*, 482 U.S. at 153; *Campbell*, 461 U.S. at 461, 468.

The Court has therefore upheld as reasonable the SSA's use of general rules at step five of the evaluation process when the SSA determines whether an applicant can perform other work that exists in significant numbers in the national economy. See *Campbell*, 461 U.S. at 467-468. The Court has also described favorably the SSA's rule under which an individual with an impairment listed in the regulations is presumed to be "disabled" and "unable to work" without any

inquiry into his actual ability to do his past work. See *Yuckert*, 482 U.S. at 153. And, Congress itself approved that practice when it crafted the current definition of disability in 1967. See S. Rep. No. 744, 90th Cong., 1st Sess. 49 (1967).

In contrast, the determination whether a person with a disability is "qualified" to sue under the ADA always "requires an individualized, case-by-case assessment of the specific abilities of the person, the specific requirements of the position that the person holds or desires, and the manner in which the person may be able or enabled to meet those requirements." *EEOC Guidance* at 70:1255. See also 29 C.F.R. 1630.2(o)(3) (accommodation process requires consideration of the "precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations"). The ADA was intended to substitute individualized assessment for stereotyped assumptions, see 42 U.S.C. 12101(a)(7), and, in the employment context, it requires a detailed evaluation of an individual's ability to work with reasonable accomodations and an employer's ability to make those accommodations. Those evaluations are time consuming and are inconsistent with the more streamlined decision-making necessary for the efficient administration of the Social Security Act.

3. A third reason that "qualified" status under the ADA is not inconsistent with receipt of Social Security disability benefits is that the Social Security Act allows disability insurance benefit recipients a trial work period of up to nine months during which they can continue to receive full benefits while they also work. See 42 U.S.C. 422(c), 423(e)(1); 20 C.F.R. 404.1592; *Overton* v. *Reilly*, 977 F.2d 1190, 1192 (7th Cir. 1992). Individuals can also remain entitled to benefits for a further period of time in any month during the period in which their earnings fall below a specified level. See 20 C.F.R. 404.1592a. Those work incentives reflect the Social Security Act's purpose to encourage individuals with disabilities to work whenever possible, see 42 U.S.C. 422(a);

1955 House Report, *supra*, at 5; Statement by the President upon Signing the Social Security Amendments of 1956, Pub. Papers ¶ 158, at 639 (Aug. 1, 1956), and demonstrate that Congress recognized that persons who legitimately apply for and receive Social Security disability benefits may nonetheless be or become able to work.

In that respect, the Social Security Act works in tandem with the pro-work policies of the ADA. In enacting the ADA, Congress assumed that many individuals on the disability benefit rolls could, with assistance or accommodation, obtain employment. See 1990 House Report, *supra*, at 32-34. Congress envisioned the reasonable-accommodation requirement, in particular, as a device for alleviating the "staggering levels of unemployment and poverty" among the approximately "8.2 million people with disabilities [who] want to work but cannot find a job," the majority of whom are dependent upon "insurance payments or government benefits for support." *Id.* at 32, 33.

Congress thus did not intend to limit the protections of the ADA to those individuals who fall outside the eligibility standards for disability benefits under the Social Security Act. Nor did it intend that the ADA would disqualify from the benefit rolls disabled individuals who might be capable of performing their prior work with reasonable accommodations that had not been provided. To the contrary, Congress enacted the ADA with the very goal of maximizing the employment opportunities of individuals actually receiving disability benefits. 1990 House Report, *supra*, at 32-34. There is thus nothing either contradictory or inappropriate in a disability beneficiary's use of the ADA to break down the barriers to employment imposed by disability-based discrimination. In fact, because many recipients of disability benefits could work only if reasonable accommodations were made, their only route from reliance on benefits to financial independence is through the ADA's protections.

4. The work incentive provisions in the Social Security Act reflect not only the congressional goal of facilitating the return of people with disabilities to the work force but also the fact that disability status may change over time. That fact provides a final reason why claims under the two Acts may be fully consistent.

Under the ADA, the "determination of whether an individual with a disability is qualified is to be made at the time of the employment decision." *Interpretive Guidance on Title I of the Americans with Disabilities Act*, 29 C.F.R. Pt. 1630 App. at 351. An individual may apply for disability benefits, however, a significant period of time after the individual has been discharged. The individual may not be able to work at that time even though she could have performed her job at the time she was terminated. It is not unusual for an individual with a disability to be capable of performing a job, with or without accommodations, only to have her condition worsen over time to the point that she can no longer work. See *EEOC Guidance* at 70:1264-70:1265; see also *D'Aprile* v. *Fleet Servs. Corp.*, 92 F.3d 1, 4 (1st Cir. 1996) (receipt of private disability benefits not inconsistent with state law discrimination claim because disability worsened after, and as a result of, adverse employment action). Conversely, an individual may apply for benefits because of a disability that prevents her from working but may gradually recover so that, at a certain point, she is again capable of working, perhaps with accommodations.

5. Because of the differences described above, neither the application for and receipt of disability benefits nor the applicant's assertion of "disability" and "inability to work" within the meaning of the Social Security Act is factually inconsistent with a claim that the person is a "qualified individual with a disability" under the ADA. Those words are terms of art under the respective statutes. Thus, when SSA forms (often generated by the agency's computerized application system) use standard language asserting that the applicant is "unable to work" and "disabled," see, *e.g.*, *Mohamed* v. *Marriott Int'l, Inc.*, 944 F. Supp. 277, 279 (S.D.N.Y. 1996); *Griffith* v. *Wal-Mart Stores, Inc.*, 930 F. Supp. 1167, 1168-1169 (E.D. Ky. 1996), rev'd on other grounds, 135 F.3d 376 (6th Cir. 1998), petition for cert. pending, No. 97-1991, those standardized assertions incorporate the meaning of the terms they use under the Social Security Act and its implementing regulations.[3] The forms do not ask whether the applicant can perform the essential functions of her prior job with reasonable accommodations, *i.e.*, whether she is a "qualified individual" under the ADA. And the forms do not suggest that a claimant may qualify the statements attesting to her disability and inability to work by noting that she would be able to work if she were provided reasonable accommodations. Therefore, when petitioner filed a claim for disability benefits under the Social Security Act, she was not making any representation about her status as a "qualified individual" under the ADA, and the court of appeals erred in suggesting that she should have qualified her statements attesting her disability and inability to work. See Pet. App. 12a & n.19.[4]

Neither respondent nor the court of appeals disputes the interpretations of the ADA and the Social Security Act set forth above, see Pet. App. 10a-11a; Br. in Opp. 18-19, nor is

[3] Indeed, some of SSA's standardized forms were revised after petitioner submitted her application and requests for reconsideration and now explicitly state that the terms they use have the meaning given those terms in the Social Security Act.

[4] To the contrary, SSA regulations state that, if a person "*believe[s]*" that she "*may* be entitled to benefits," she "should file an application," 20 C.F.R. 404.603 (emphasis added), on forms prescribed by the SSA. 20 C.F.R. 404.610(a), 404.611(a). Thus, someone who files a benefits application with the SSA and invokes the standardized claims that she is "disabled" and "unable to work" is, in essence, simply requesting that the SSA apply its technical and specialized rules to determine if she is entitled to disability benefits.

there any basis to do so. If there were any question of the validity of the interpretations, which there is not, this Court should defer to the agencies charged with administering the statutes. The SSA's interpretation of the Social Security Act is entitled to great deference. See *Yuckert*, 482 U.S. at 145; *Campbell*, 461 U.S. at 466. The EEOC's interpretation of Title I of the ADA is entitled to comparable deference because the EEOC has been directed by Congress to issue regulations to implement the statute, 42 U.S.C. 12116, and has responsibility to enforce it in court with respect to private employers, 42 U.S.C. 12117(a). See *Bragdon* v. *Abbott*, 118 S.Ct. 2196, 2209 (1998) (Justice Department's interpretation of ADA Title III receives deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because of Department's regulatory and enforcement responsibility for that Title). Cf. *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257-258 (1991) (declining to accord deference to EEOC's Guideline on extraterritorial application of Title VII because EEOC lacks regulatory authority over Title VII). In any event, the EEOC's interpretation of the requirements of the ADA is a "well-reasoned view[] of the agenc[y] implementing [the] statute" to which the Court "may properly resort for guidance." *Bragdon*, 118 S.Ct. at 2207 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944)). Finally, because there is no dispute that those interpretations did in fact govern the application and award of benefits in this case and petitioner's claim for relief under the ADA, there is no support for the suggestion that petitioner has taken inconsistent positions by making claims under both statutes.

B. The Court Of Appeals Erred In Adopting A Rebuttable Presumption That An Applicant For Or Recipient Of Social Security Disability Benefits Is Judicially Estopped From Asserting That She Is A "Qualified Individual With A Disability"

1. Because there is no inconsistency between the receipt of or application for Social Security benefits and status as a "qualified individual" under the ADA, the court of appeals erred in presuming that a benefit applicant or recipient is judicially estopped from asserting that she is qualified under the ADA. Judicial estoppel is an equitable doctrine, accepted by some jurisdictions, that seeks to protect the integrity of the judicial process by barring a party from asserting in a legal proceeding a position contrary to a position that the party took in the same or an earlier proceeding. See Pet. App. 8a; see generally C. Wright et al., *Federal Practice and Procedure* § 4477 (1981 & Supp. 1998); *Konstantinidis* v. *Chen*, 626 F.2d 933, 937-938 (D.C. Cir. 1980). Judicial estoppel is properly invoked only when a litigant seeks to advance a position that conflicts with a prior position. See Wright, *supra*, § 4477, at 782-784.[5]

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[5] The doctrine of judicial estoppel has not been universally applied even when there are specific contradictory statements under oath. Although this Court has recognized the related doctrine of equitable estoppel (which requires that the party that seeks the benefit of estoppel have actually relied on the prior inconsistent position), see *Davis* v. *Wakelee*, 156 U.S. 680, 689-691 (1895), the Court has not passed on the propriety of judicial estoppel. Two courts of appeals do not recognize the doctrine at all and instead treat prior inconsistent statements as relevant, but not preclusive, in a subsequent judicial action. See *UMWA 1974 Pension* v. *Pittston Co.*, 984 F.2d 469, 477-478 (D.C. Cir.), cert. denied, 509 U.S. 924 (1993); *United States* v. *49.01 Acres of Land, More or Less*, 802 F.2d 387, 390 (10th Cir. 1986). Other courts have limited the doctrine to cases in which prior inconsistent statements were made in judicial proceedings. See, *e.g.*, *Smith* v. *Travelers Ins. Co.*, 438 F.2d 373, 377 (6th Cir.), cert. denied, 404 U.S. 832 (1971). Still other courts apply estoppel

Presumptions, in turn, are appropriate when proof of a particular fact renders the existence of another fact sufficiently "probable" to make it "sensible and timesaving to assume the truth of [that other fact] until the adversary disproves it." 2 *McCormick on Evidence* § 343, at 454-455 (J. Strong ed., 4th ed. 1992). See, *e.g.*, *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) (presumption created by prima facie Title VII case is appropriate because those facts, if unexplained, suggest "it is more likely than not" that the employer's acts were discriminatory); *Manning* v. *Insurance Co.*, 100 U.S. 693, 698 (1879) ("presumed fact must have an immediate connection with or relation to the established fact from which it is inferred"); *Insurance Co.* v. *Weide*, 78 U.S. (11 Wall.) 438, 441-442 (1870) ("A presumption is an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known.").

Here, there is no empirical basis for concluding that the fact that an individual has applied for or received Social Security disability benefits means that it is probable, likely, or usual that the disability and ADA claims are in conflict. As discussed above, the two claims are reconcilable in a variety of ways: because as in this case, the ADA claim turns on the issue of reasonable accommodation; or because disability payments were awarded based on regulatory presumptions; or because the claimant was receiving benefits under one of the Social Security Act's work incentive provisions; or because the claimant's disability status has changed. The two Acts serve persons with mental or physical impairments in complementary ways, and there is no conflict between claims under both statutes.

2. More fundamentally, "[c]ourts do not, of course, have free rein to impose rules of preclusion, as a matter of policy,

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only if the prior inconsistent position was actually accepted by the court. See, *e.g.*, *Lowery* v. *Stovall*, 92 F.3d 219, 224 (4th Cir. 1996), cert. denied, 519 U.S. 1113 (1997).

when the interpretation of a statute is at hand." *Astoria Fed. Sav. & Loan Ass'n* v. *Solomino*, 501 U.S. 104, 108 (1991). The use of judicial estoppel to bar an action under the ADA is inconsistent with the statutory scheme and would frustrate the purposes of both the ADA and the Social Security Act. Like many other anti-discrimination statutes, the ADA relies in large part on private suits to vindicate the statute's anti-discrimination goal. See 42 U.S.C. 12117(a) (incorporating Title VII's remedial scheme); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). Litigation under the ADA promotes the public interest of "forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from * * * discrimination." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995). Thus, the objectives of the ADA are furthered whenever "a single employee establishes that an employer has discriminated against him or her." *Id.* at 358. "The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from misappreciation of the Act's operation or entrenched resistance to its command, either of which can be of industry-wide significance." *Id.* at 358-359.

As this Court has recognized, application of equitable bar doctrines is therefore inappropriate "where a private suit serves important public purposes." See *McKennon*, 513 U.S. at 360 (quoting *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 138 (1968)). Cf. *Oubre* v. *Entergy Operations, Inc.*, 118 S.Ct. 838, 841-842 (1998) (rejecting equitable estoppel and ratification defenses to ADEA claim because they would "frustrate the statute's practical operation as well as its formal command"). See also *In re Morristown & Erie R.R.*, 677 F.2d 360, 368 n.10 (3d Cir. 1982) (judicial estoppel is not applied when the plaintiff's suit "implicates not only the relevant interests of the litigating parties,

but also the public's interest in promoting the policies underlying the statute"). In those circumstances, "broad interests of public policy" "make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests." Wright, *supra*, § 4477, at 784.

Application of judicial estoppel would also frustrate the common purpose of the ADA and the Social Security Act to enable persons with disabilities to move off the benefit rolls and to return to work. Individuals with potentially meritorious ADA claims frequently apply for disability benefits in order to support themselves following their discharge from employment. They apply for (and often properly receive) benefits because they face real-world barriers to employment, even though they could work with reasonable accommodations. They are therefore qualified individuals with disabilities under the ADA. If they are able to bring ADA actions, they may ultimately return to work, as Congress envisioned. The application of judicial estoppel improperly bars them from maintaining actions under the ADA and thus increases the likelihood that they will remain on the benefit rolls.

Finally, application of judicial estoppel ignores the practical difficulties of requiring an individual who has stopped working because of health problems to choose between seeking disability benefits and pursuing a remedy under the ADA. It is often uncertain whether such a person ultimately will be determined to be disabled and thus entitled to benefits under the Social Security Act and at least equally uncertain whether he could obtain relief under the ADA. Resolution of those issues can be a lengthy process. Given the uncertainties and delays, a rule that application for Social Security benefits precludes ADA relief would place that individual in what several courts have described as an "untenable" position. See *Swanks* v. *Washington Metro. Area Transit Auth.*, 116 F.3d 582, 586 (D.C. Cir. 1997);

Mohamed, 944 F. Supp. at 284. That result is not justified by the language of either the two statutes or their implementing regulations and would undermine the purposes of both statutes. See pp. 7-22, *supra*.

3. Both the SSA and the EEOC have therefore concluded that application for or receipt of Social Security disability benefits should not estop the applicant or recipient from bringing an ADA claim. See *EEOC Guidance* at 70:1251-70:1252, 70:1254-70:1257; *SSA Guidance* at 15-400 to 15-402. Those well-reasoned views, coming from the agencies responsible for administering the statutes at issue, are entitled to deference. See p. 18, *supra*.

The majority of the courts of appeals have likewise rejected both the presumptive and the automatic application of judicial estoppel based on application for or receipt of disability benefits. See, *e.g.*, *Rascon* v. *US West Communications, Inc.*, 143 F.3d 1324, 1330-1332 (10th Cir. 1998); *Johnson* v. *Oregon*, 141 F.3d 1361, 1366-1371 (9th Cir. 1998); *Moore* v. *Payless Shoe Source, Inc.*, 139 F.3d 1210, 1212 (8th Cir. 1998), petition for cert. pending, No. 98-5286; *Griffith*, 135 F.3d at 380-383; *Talavera* v. *School Bd.*, 129 F.3d 1214, 1217-1220 (11th Cir. 1997); *Weigel* v. *Target Stores*, 122 F.3d 461, 465-468 (7th Cir. 1997); *Swanks*, 116 F.3d at 584-587. Those courts have recognized that, primarily because of the different legal standards involved, claims for disability benefits under the Social Security Act are not "conclusive as to the ADA [qualification] issue." *E.g.*, *Weigel*, 122 F.3d at 468.[6]

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[6] Although those courts agree that the doctrine of judicial estoppel should not automatically or presumptively apply in the present context, they have taken different views of the evidentiary weight to be accorded a prior claim for disability benefits. Compare, *e.g.*, *Griffith*, 135 F.3d at 383 (statements made in support of a benefit claim should be analyzed "under traditional summary judgment principles" as possibly relevant evidence bearing on the ADA qualification issue) with *Moore*, 139 F.3d at 1213 (ADA plaintiff must produce "strong countervailing evidence" to over-

II. THE WEIGHT, IF ANY, TO BE GIVEN TO STATEMENTS MADE IN CONNECTION WITH THE APPLICATION FOR OR RECEIPT OF DISABILITY INSURANCE BENEFITS DEPENDS UPON THE NATURE OF THE STATEMENTS

In the absence of estoppel, a court entertaining an ADA claim is free to give statements that the ADA claimant made in connection with an application for Social Security disability benefits the evidentiary weight that the statements deserve. Although, for the reasons set forth above, those statements will seldom be dispositive of the ADA claim, where relevant, they should be considered as evidence in the ADA action.

A. General Statements Made In Support Of A Claim For Disability Benefits Have Little Relevance To A Claim Of Discrimination Under The ADA

Primarily because of the different legal standards applied under the two statutes, general statements made in support of a claim for disability benefits have little, if any, relevance to a discrimination claim under the ADA. In assessing the weight to be given statements on a disability benefit application, one must consider the context in which those statements were made. As one court of appeals has noted, terms such as "'totally disabled,' 'wholly unable to work,' or some other variant to the same effect" are terms of art, deriving their meaning from a particular statutory context. *Weigel*, 122 F.3d at 467-468. The fact that an individual states that he or she is "disabled" or "unable to work" within the mean-

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come prior sworn statements of a disability); see also *Johnson*, 141 F.3d at 1369 (leaving open the possibility that estoppel might apply in some cases but stating that, "in most cases," "'[s]traightforward summary judgment analysis, rather than theories of estoppel' will be appropriate") (quoting *Griffith*, 135 F.3d at 382-383)); *Krouse* v. *American Sterilizer Co.*, 126 F.3d 494, 502-503 & nn.3-5 (3d Cir. 1997) (suggesting that estoppel might apply when there are unconditional assertions of an inability to work).

ing of the legal standards applied by the SSA does not preclude the possibility that the individual is a "qualified individual" under the ADA. It simply means that the individual believes that he or she may meet the eligibility standards for disability benefits, as those standards are applied by the SSA. See pp. 16-17 & n.4, *supra*. The mere certification of eligibility for disability benefits, using the vernacular of the SSA, thus has little bearing on the ADA qualification issue:[7]

This case illustrates the point. In applying for Social Security disability benefits, petitioner made representations on a computerized application generated by the SSA, using the terminology supplied by the SSA. She claimed that she was "unable to work" but only in the narrow context of the legal standards applied by the SSA. Petitioner never claimed that she was unable to perform her prior job with reasonable accommodation. Petitioner, in fact, said nothing in her application that was incompatible with her claim that she was a "qualified individual" under the ADA. Petitioner's application represents the prototypical case of a general claim for disability benefits that is marginally relevant, if at all, to the issue of qualification in an ADA action. Yet, in holding that petitioner was estopped from asserting that she was "qualified" under the ADA, the court of appeals focused exclu-

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[7] The Social Security Act is not the only disability benefit program. Many private insurance plans and state disability insurance programs (such as workers' compensation) award benefits upon similar findings of "disability" or "inability to work" within the meaning of the legal standards applied under those plans or programs. The EEOC has carefully studied the legal standards used in the private insurance and workers' compensation contexts and has concluded that most of those plans and programs do not "distinguish between marginal and essential functions and do not consider whether an individual can work with reasonable accommodation." *EEOC Guidance* at 70:1257-70:1258. Statements made in support of a claim for disability benefits in those other contexts are ordinarily entitled to no more weight in an ADA action than assertions made in support of a claim for disability benefits under the Social Security Act.

sively on petitioner's use of standardized language contained in SSA's forms that asserted her disability and inability to work, without even considering what that language means in the context of the Social Security disability program. See Pet. App. 12a.

The fact that the SSA awarded benefits to petitioner does not change the analysis. As described above, the SSA relies upon a complex five-step process to determine eligibility for disability benefits. The legal standards applied under that process are not tailored to the ADA's qualification standards. See pp. 7-15, *supra*. Standing alone, an award of disability benefits under the Social Security Act means one thing only—that the applicant is disabled within the meaning of the legal standards applied under the Social Security Act.[8]

The Eighth Circuit has erroneously suggested that an ADA plaintiff who has applied for or received disability benefits must produce "strong countervailing evidence" to withstand summary judgment on the qualification issue. See *Moore*, 139 F.3d at 1213. As we explain below, in some circumstances, statements made in a disability benefit application may well have relevance to an ADA claim. In no case, however, should the mere application for or receipt of disability benefits or a conclusory statement that one is "disabled" or "unable to work" (under SSA's legal scheme) re-

[8] This Court has held that administrative findings (unreviewed by a court) "enjoy no preclusive effect in subsequent judicial litigation" under either Title VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act of 1967. *Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 113; accord *University of Tenn.* v. *Elliott*, 478 U.S. 788, 794-796 (1986). Those holdings logically extend to Title I of the ADA, which incorporates Title VII's enforcement procedures. See 42 U.S.C. 12117(a). Thus, even if the legal standards under the two Acts were the same, findings made in an SSA proceeding in support of an award of disability benefits would not be binding in a subsequent ADA action. The findings might, however, be relevant evidence in the subsequent action. See *Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 114; *Chandler* v. *Roudebush*, 425 U.S. 840, 863 n.39 (1976).

quire the plaintiff to meet a heightened evidentiary burden in order to survive summary judgment. When, under normal summary judgment standards, there is competent evidence to support a finding that an individual "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires," 42 U.S.C. 12111(8), the individual should be permitted to pursue her ADA claim, notwithstanding a prior claim for disability insurance benefits. Any other standard would threaten to interpose, under the guise of an evidentiary standard, the equivalent of the estoppel doctrine applied by the court of appeals in this case. The result would be an effective bar to many ADA actions, leaving significant numbers of disabled individuals without the legal recourse for disability discrimination to which they are entitled under the ADA.[9]

B. Specific Factual Assertions Made Or Evidence Offered In Support Of An Application For Disability Benefits Is Relevant To An ADA Action If Those Representations Are Inconsistent With Specific Factual Assertions Made In Support Of The ADA Claim

Although a general claim of disability status under the Social Security Act has little relevance to a subsequent ADA claim, in some cases, the applicant for disability benefits will have made specific factual assertions or offered specific evidence concerning her functional capacities. In those

[9] Approximately 7.8 million adults received disability benefits under the Social Security Act as of the end of 1997. Memorandum from Peter Wheeler, Assoc. Comm'r for Research, Education, and Statistics, SSA, to Jane Ross, Deputy Comm'r for Policy, SSA, 2 (June 3, 1998). That number accounts for nearly 25% of the approximately 32 million working-age people with a disability in the United States. See S. Stoddard et al., U.S. Dep't of Educ., *Chartbook on Work and Disability in the United States* 4 (InfoUse 1998).

cases, the assertions or evidence may be relevant to the individual's ability to perform the essential functions of a particular job and thus to the individual's claim under the ADA.

The relevance of those assertions or evidence depends upon the circumstances. One critical circumstance is timing. Because disability status may change over time, as explained above, see p. 16, *supra*, an applicant's representations about her functional capacities at the time she applies for benefits may not be probative of her functional capacities at the time of the challenged employment decision, which is the critical time for assessing her qualification to sue under the ADA. In addition, an applicant's representations about her functional capacities may not have addressed how those functional capacities might be expanded if an employer provided reasonable accommodations.

Specific factual representations in connection with a benefits application that are indeed inconsistent with later assertions in support of an ADA claim (representations which are not present in this case) would be relevant evidence in the ADA action. They might be used to impeach the claimant and thus make it difficult for her to prevail on her ADA claim. Whether she prevails, however, should depend on whether the statements made in support of the ADA claim are determined to be true or false, not on the invocation of a legal bar against even taking the assertedly inconsistent positions. See pp. 20-23, *supra* (explaining why judicial estoppel is never appropriate in an ADA suit).

If the plaintiff prevails in the ADA action in part because she disclaims the truth of prior statements or evidence on which the SSA relied to award benefits, that fact may be taken into account at the relief stage of the case. For example, amounts received as disability benefits might be offset against any monetary relief obtained under the ADA. Alternatively, the SSA could seek to terminate the benefits and to recoup any overpayments, see 42 U.S.C. 405(u); 20

C.F.R. 404.988(c), so that neither the employee nor the discriminating employer would reap a windfall from misstatements to the SSA.[10] Those options would avoid a double recovery but permit the ADA action to go forward. Cf. *McKennon*, 513 U.S. at 360-362 (after-acquired evidence of misconduct on the plaintiff's part, although not a bar to the plaintiff's age discrimination suit, can limit the relief awarded in that suit).

In its opinion in this case, the Fifth Circuit correctly remarked that the law has an interest in protecting "the integrity of the judicial process." Pet. App. 8a & n.10. The integrity of the process can be preserved, however, without resort to preclusion doctrines that undermine the objectives of the ADA and the Social Security Act. See *Johnson*, 141 F.3d at 1369.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[10] It should be noted, however, that there can be practical difficulties in recovering overpayments when the person who received them is no longer receiving benefits.

(5)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CAROLYN C. CLEVELAND,

Petitioner,

v.

POLICY MANAGEMENT SYSTEMS CORP., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*?

2. If it does not create such a presumption, what weight, if any, should be given to the application for, or receipt of, disability insurance benefits when a person asserts that she is a "qualified individual with a disability" under the ADA?

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INTEREST OF *AMICI CURIAE*

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes.[1] NELA is one of the largest organizations in the United States whose members litigate and counsel employees and applicants for employment on claims arising in the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs on employment law and civil rights issues. Some recent cases before this Court and other courts are: *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S.Ct. 2275 (1998); *Burlington Industries v. Ellerth*, ___ U.S. ___, 118 S.Ct. 2257 (1998); *Oncale v. Sundowner Offshore Services Inc.*, ___ U.S. ___, 118 S.Ct. 998 (1998); *Oubre v. Entergy Operations, Inc.*, ___ U.S. ___, 117 S.Ct. 1466 (1997); *Kapche v. City of San Antonio*, No. 98-50345 (5th Cir. 1998); *McNemar v. The Disney Stores, Inc.*, 91 F.3d 610 (3d Cir. 1996), *cert. denied*, 117 S.Ct. 958 (1997); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995); and *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106 (5th Cir. 1995).

NELA members have brought numerous cases under the Americans with Disabilities Act. NELA members have also represented thousands of individuals in this

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[1] The parties have consented to the filing of this brief; this consent has been filed with the Clerk of the Court. No part of the attached brief has been authored by counsel for either party or any other entity. No persons other than the *Amici Curiae*, its members or its counsel made a monetary contribution to the preparation and submission of this brief.

country who are victims of employment discrimination based on disability status. One of the primary purposes of NELA is to represent, protect, and defend the interests of employees involved in workplace disputes, including workers who are involved in litigation under the ADA.

This case represents an opportunity to address the inconsistent and inherently unfair application of the judicial estoppel doctrine, which has operated to preclude many potential plaintiffs from successfully litigating their claims of disability discrimination under the ADA. NELA submits this brief to urge the Court to abandon the use of judicial estoppel doctrine in cases under the ADA. In so doing, NELA seeks to protect the interests of its members and their clients, by helping to ensure that the goal of the Americans with Disabilities Act is fully realized.

The Association of Trial Lawyers of America (ATLA) is a voluntary national bar association of approximately 50,000 members across the country. ATLA members primarily represent plaintiffs in personal injury suits, civil rights actions and employment discrimination cases. For over 50 years, ATLA's mission has been to preserve the right to trial by jury in civil cases guaranteed by the Seventh Amendment. In addition, ATLA has been a staunch supporter of the Americans with Disabilities Act, and ATLA members have represented plaintiffs seeking vindication of their rights under the Act through civil actions.

SUMMARY OF THE ARGUMENT

The use of judicial estoppel against ADA claimants who have applied for or received disability benefits is a devastating new use for this obscure, amorphous, and previously rarely used doctrine. In recent years, it has been a favorite defensive weapon used by employers in ADA cases where the wronged employee or job seeker has applied for or received disability benefits. Increasingly, it is being used by courts to deprive persons with disabilities of the opportunity to be heard as an equitable sanction against perceived inconsistency.

Amici suggest that judicial estoppel is a pernicious doctrine that deprives persons with disabilities of the intended protections of the ADA, and violates the right of a qualified individual to his or her Seventh Amendment right to a jury trial. More importantly, the professed concerns of courts employing this antiquated and unnecessary doctrine are better served by application of our modern rules of procedure, including those governing alternative pleading, summary judgment, and the imposition of sanctions for the assertion of frivolous claims.

On behalf of the 54 million Americans who report some form of physical or mental disability,[2] and in compliance with the clear intent of Congress when it passed the ADA on July 26, 1990, *Amici* propose that the harsh

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[2] The United States Department of Commerce in its press release of September 16, 1997 stated that between October, 1994 and January, 1995, approximately 54 million Americans (one in every five) reported some level of disability, and 26 million Americans (one in every ten) reported their level of disability to be severe.

and unjust results often caused by the doctrine's application could be avoided, by abandoning its use in favor of other mechanisms better calculated to seek truth and civil justice.

Indeed, this position is well-supported by the following discussion of the origins and history of this inequitable doctrine, the unduly punitive effect on the right of a person with a disability to be heard under the provisions of an important civil rights law, and the facile correction of any claimant's improper action by using existing civil rules and mechanisms.

STATEMENT OF THE CASE

On January 7, 1994, Carolyn C. Cleveland ("Cleveland") suffered a stroke in the course of her employment with the Policy Management Systems Corporation ("PMSC"). As a result, she was afflicted with aphasia, a disorder affecting the processing of language (including speaking and reading), concentration, and memory.

On January 26, 1994, she signed an application (prepared by her daughter on her behalf) for Social Security disability benefits, certifying in the standard language of the Social Security Administration's ("SSA") computer-generated application forms that she "became unable to work because of my disabling condition on January 7, 1994" and that "I am still disabled."[3]

[3] Cleveland avers that she has no recollection of signing or filing the application.

As the result of intensive rehabilitative efforts, Cleveland returned to work on April 11, 1994[4] and advised the SSA's local agency, the Texas Rehabilitation Commission, that she no longer needed disability benefits. On July 11, 1994, the SSA officially denied her request for benefits.

Four days later, on July 15, 1994, Cleveland was terminated from her employment with PMSC. This event caused her to become depressed and exacerbated her aphasia to the extent that on September 14, 1998, she decided to renew her application for disability benefits by requesting the reconsideration of the earlier denial. Once again, she signed an SSA computerized form which stated that she was terminated "because I could no longer do the job because of my condition" and that she was "still disabled."

In January, 1995, Cleveland renewed her request for reconsideration of the denial of benefits and in May, 1995, she requested a hearing on the basis that in the language provided in the form, she was "unable to work due to my disability." In September, 1995, Cleveland was awarded disability benefits retroactively to January 7, 1994.

One week before the SSA's decision was published, Cleveland filed an action against PMSC for failing to accommodate her condition and terminating her because she was a person with a disability, all in violation of

[4] Following her return to work, Cleveland had problems carrying out her duties and requested accommodations (*inter alia*, computer training, permission to take work home, and transfer) which were denied by PMSC.

the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* and the applicable Texas statute.[5]

PMSC moved for summary judgment asserting that Cleveland could not establish that she was a "qualified individual with a disability," an essential element of her claim. In response, Cleveland averred in a sworn affidavit that she was unable to do her job because she was denied reasonable accommodation, and that her condition was worsened by her termination. She also proffered the opinion of her treating physician, who agreed that her discharge increased her symptoms to the point of disability, and that if she had been granted appropriate accommodation on the job, she would have been able to continue to work.

The district court granted the motion for summary judgment filed by PMSC and, on appeal, the United States Court of Appeals for the Fifth Circuit affirmed.[6] In making its decision, the Fifth Circuit refused to "adopt a *per se* rule that automatically and absolutely prevents an applicant for or recipient of social security disability benefits from asserting a claim of disability discrimination under the ADA"[7] but held that since there may "conceivably" be "credible, admissible evidence . . . sufficient to show that, even though he may be disabled for purposes of social security, he is otherwise qualified to perform the essential functions of his job with a reasonable accommodation and thus not

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[5] Tex. Lab. Code Ann. § 451.001 (Vernon 1996).

[6] *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513 (5th Cir. 1997).

[7] *Id.* at 517.

estopped from asserting an ADA claim," and that an "application for or the receipt of social security disability benefits creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.'"[8]

The Fifth Circuit then resolved that since Cleveland's "sworn statements to the SSA that she was disabled"[9] were continuous and unequivocal, she could not be permitted to contradict that position before the district court and therefore, was "judicially estopped from now asserting that for the time in question she was nevertheless 'a qualified individual with a disability' for purposes of her ADA claim."[10]

ARGUMENT

I. JUDICIAL ESTOPPEL IS AN ARCHAIC AND PERNICIOUS DOCTRINE WHICH VIOLATES STANDARDS OF FAIRNESS AND IS CONTRARY TO EXISTING RULES OF PROCEDURE.

A. The Judicial Estoppel Doctrine's History Reveals Conflict and Confusion.[11]

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[8] *Id.* at 518.

[9] *Id.* at 518.

[10] *Id.* at 519.

[11] Other forms of more easily justifiable estoppel have been, and continue to be, employed in federal litigation:

Equitable estoppel is designed to protect parties who have also been parties in a previous suit from the prejudice that would occur as a result of detrimental reliance on a previously

(continued...)

Judicial estoppel, which alternatively has been labeled as the doctrine against inconsistent positions or estoppel by oath,[12] is a concept based in equity jurisdiction that has been invoked by the courts (as opposed to the parties) for the avowed purpose of preventing litigants from gaining a litigation advantage by asserting incompatible positions in different proceedings.[13]

The doctrine was developed in the mid-1800s in an era before the promulgation of modern pleading rules (including the Federal Rules of Civil Procedure) to promote the broad public policy objectives of protecting the in-

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[11] (...continued)

asserted position. *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980).

Collateral estoppel (often called issue preclusion) serves to prevent litigants from relitigating identical issues. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979).

The doctrine of *res judicata* (claim preclusion) applies only when there is an identity of the parties in both suits. It is calculated to ensure that litigants rely on previous court rulings. *Brown v. Felsen*, 442 U.S. 127, 131 (1979).

[12] See *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996); *Ellis v. Arkansas La. Gas Co.*, 609 F.2d 436, 440-41 (10th Cir. 1979); Douglas W. Henkin, *Judicial Estoppel-Beating Shields into Swords and Back Again*, 139 U. Pa. L. Rev. 1711 n.1 (1991); Mark J. Plumer, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L. Rev. 409, 410 n.8 (1987); Rand G. Boyers, *Comment-Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. Univ. L. Rev. 1244 (1986).

[13] The doctrine is clearly distinct from the other forms of preclusionary estoppel discussed above, including collateral estoppel or issue preclusion and res judicata or claim preclusion. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). See n.11.

tegrity of the judicial system and upholding the sanctity of the oath. Its aim was to prevent a litigant from "playing fast and loose with the courts"[14] or to bar a party from "speaking out of both sides of her mouth with equal vigor and credibility."[15] Unfortunately, as recognized by both the Tenth Circuit[16] and D.C. Circuit Courts of Appeal,[17] the doctrine also prevents a party from explaining a perceived inconsistency and may "impede the truth seeking purpose of the judicial system, as its use will more often than not result in a litigant's entire case being thrown out."[18]

In fact, conflicting assertions may not be actual inconsistencies, but merely reflections of changed circumstances. In the context of the ADA, a claimant like Ms. Cleveland, who asserts an ability to work after filing a claim of total disability, presenting contrary averments may not be "playing fast and loose" with the truth, but may only constitute a reflection of a later change in physical ability. A court employing the doctrine of judicial estoppel is, however, only required to

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[14] *McNemar v. Disney Stores, Inc.*, 91 F.3d 610, 617, 618 (3d Cir. 1996), *cert. denied*, 117 S.Ct. 958 (1997); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953).

[15] *Reigel v. Kaiser Found. Health Plan of North Carolina*, 859 F.Supp. 963, 970 (E.D. N.C. 1994). *See also Rissetto v. Plumbers and Steamfitters Local 343, supra*, and *Dockery v. North Shore Med. Ctr.*, 909 F.Supp. 1550 (S.D. Fla. 1995).

[16] *Parkinson v. California Company*, 233 F.2d 432 (10th Cir. 1956).

[17] *Konstantinidis v. Chen*, 626 F.2d 933 (D.C. Cir. 1980).

[18] Douglas W. Hanken, *Judicial Estoppel – Beating Shields Into Swords and Back Again, supra*.

review the facial consistency of the alleged untruthful prior assertions and not the facts behind them, and therefore, would thus be unable to exercise its truth-seeking function. Our courts generally have recognized the danger of taking a doctrinaire approach in the search for the truth in any case, because "truth is the essential objective of our adversary system of justice." *U.S. v. Beechum*, 582 F.2d 898 (5th Cir. 1978). This Court has refused to accord a collateral estoppel effect when the result would be to prevent the "fullest possible inquiry" into the evidence, *Brown v. Felson*, 442 U.S. at 138 (1979), and to "blockade unexplored paths that may lead to truth." *Id.* at 132. *See also Estes v. Texas*, 381 U.S. 532, 540 (1965) (discovering truth is the "*sine qua non* of a fair trial") and *Nix v. Williams*, 467 U.S. 431, 445 (1984) (our legal system exalts "the search for truth in the administration of justice").

The doctrine has never been uniformly defined or adopted by either state or federal courts, nor has it ever been the subject of an explicit ruling by this Court. The first appearance of the doctrine was in the 1857 Tennessee Supreme Court case of *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39 (1857) wherein a store clerk was prohibited from pursuing a claim of partnership when he had asserted in an earlier court action that he was only an employee. Since that time, federal and state courts discussing the doctrine have applied it with differing formulations or rejected it outright.[19] See, for

[19] For a comprehensive survey of those state and federal courts that have accepted or rejected the use of the doctrine, see *Judicial Estoppel – Beating Swords into Shields and Back Again, supra,* Appendix and n.3.

example, the state court decisions in *Ray v. Midfield Park, Inc.*, 289 Ala. 137, 142, 266 So.2d 291, 295 (1972), *Long v. Knox,* 155 Tex. 581, 585, 291 S.W.2d 292 (1956) and *Allen v. Allen,* 550 P.2d 1137, 1142 (Wyo. 1976), which disagree as to whether the doctrine requires prior success, actual prejudice, or actions taken in a prior "judicial" proceeding. Additionally, at least three states have rejected the use of the doctrine completely. *See Brown v. Gerstein,* 17 Mass. App. Ct. 558, 460 N.E.2d 1043 (1984); *MacFarlane v. Manly,* 274 S.C. 392, 264 S.E.2d 838 (1980); and *Doyle v. State Farm Insurance Co.*, 414 So.2d 763 (La. 1982).

This lack of uniformity in the application and interpretation of the doctrine in state courts is also demonstrated by the multiplicity of conflicting opinions in the federal circuits which have applied the doctrine. The doctrine has been accepted in the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh and Federal Circuits. It has been rejected by the Tenth and D.C. Circuits. While both the First and Second Circuits have accepted the doctrine, its continued applicability there has been placed in doubt, due to conflicting panel opinions.[20]

The Tenth and the D.C. Circuits reject the use of the doctrine because it precludes a search for the truth.[21]

[20] *Judicial Estoppel – Beating Swords into Shields and Back Again, supra,* at n.3.

[21] That judicial estoppel violates standards of fairness and due process because it suppresses the truth has been noted by this court and by other courts and commentators. The Court of Appeals for the Sixth Circuit has said that

(continued...)

Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1522 (10th Cir. 1991); *Parkinson v. California Company, supra*; *United Mine Workers of America 1974 Pension v. Pittston Co.*, 984 F.2d 469, 477 (D.C. Cir. 1993); *Konstantinidis v. Chen, supra.*

The Third Circuit appears to stand alone in allowing the application of the doctrine without the prerequisite of a *successful* prior proceeding. Compare *Ryan Operations GP v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996) with *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *U.S. for Use of American Bank v. CIT Const. Inc. of Texas*, 944 F.2d 253 (5th Cir. 1991); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595 (6th Cir. 1982); *Astor Chauffeured Limousine v. Runnfeldt Investment Corp.*, 910 F.2d 1540 (7th Cir. 1990) (all agreeing prior success is necessary for application of judicial estoppel).

Additionally, the courts of the several circuits adopting the doctrine also appear to disagree as to whether the prior success need have been in a court of law or at least in a quasi-judicial proceeding. Compare *Ryan,*

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[21] (...continued)

> [j]udicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement.

Teledyne Industries, Inc. v. N.L.R.B., 911 F.2d 1214, 1218 (6th Cir. 1990). *See also* Douglas W. Henkin, *Judicial Estoppel – Beating Shields Into Swords and Back Again*, 139 U. Pa. L. Rev. 1711 (1991) (judicial estoppel should be eliminated because it violates truth-seeking function of courts and liberal pleading policies of Federal Rules).

supra (Third Circuit) and *Rissetto, supra* (Ninth Circuit) to *Edwards v. Aetna Life Ins. Co., supra,* (Fifth Circuit) and *Dockery v. North Shore Medical Center, supra* (Eleventh Circuit). The circuit courts also seem divided even on the question of whether settlement in the prior proceeding constitutes the required "success." Compare *Rissetto*, 94 F.3d at 605 n.6 ("We hold that a favorable settlement constitutes the success required") to *Edwards*, 690 F.2d at 599, and *Konstantinidis*, 626 F.2d at 939 (settlement does not provide the prior approval of a court that the judicial estoppel doctrine requires).[22]

Finally, some of the Courts of Appeals have stated that judicial estoppel requires the reliance of and detriment (or prejudice) to the opposing party. *See Young v. U.S. Dept. of Justice*, 882 F.2d 633, 639-640 (2d Cir. 1989); *Jackson Jordan, Inc. v. Plasser American Corp.*, 747 F.2d 1567, 1578-80 (Fed. Cir. 1984); *Maitland v. University of Minnesota*, 43 F.3d 357, 363-364 (8th Cir. 1994).

As a result of this cacophony of voices from the circuits, the doctrine has been described as "rather

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[22] Commentators have generally followed the view that the prior proceeding must have been judicial in nature. *See* Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. 1132, 1132 n.6 (1946); Mark J. Plumer, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L. Rev. 409, 411 n.11 (1987) ("Given that the underlying policy objective of judicial estoppel is to preserve the integrity of the judicial process . . . the doctrine should be applied only when statements giving rise to the inconsistency are made in courts of law.")

vague,"[23] an "obscure doctrine,"[24] "lacking defined principles," "rather amorphous," and leading to "an *ad hoc* decision in each case."[25]

B. The Judicial Estoppel Doctrine is Incompatible with the Rules of Civil Procedure Governing Summary Judgment and Alternative Pleadings.

1. Credibility Determinations and Summary Disposition.

Based upon these splintered interpretations and inconsistent applications of the doctrine, it is clear that Carolyn Cleveland and many other ADA claimants have been barred from presenting their claims primarily because of the accident of the geography of their workplaces and the unguided discretion of the trial judge assigned to their cases. These circumstances beyond claimants' control are often then exacerbated by Courts of Appeals which allow or disallow the use of a doctrine contingent upon a *de novo* finding that a litigant appears to be lying or appears to have lied previously.

Indeed, the unhappy fact is that any trial judge or appellate body applying the doctrine must necessarily make credibility determinations and factual findings in direct violation of the prohibitions of Rule 56 of the Federal Rules of Civil Procedure and the requirements set forth by this Court in *Anderson v. Liberty Lobby,*

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[23] *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987).

[24] *U.S. v. Kattar*, 840 F.2d 118, 129 n.7 (1st Cir. 1988).

[25] *Nichols v. Scott*, 69 F.3d 1255, 1272 (5th Cir. 1995).

Inc., 477 U.S. 242, 249 (1986) ("It is not the role of the judge at the summary judgment stage to weigh the evidence or to evaluate credibility"). Allowing this doctrine to usurp the jury's traditional role should not be rationalized by wrapping summary disposition based on credibility determinations in an altruistic blanket of the very sanctity of our federal judicial system.

2. The Right to Make Alternative Averments.

Rule 8(e)(2) of the Federal Rules of Civil Procedure clearly permits a party to make inconsistent assertions in a single proceeding before our federal courts:

> A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency, and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

Fed.R.Civ.P. 8(e)(2).

Relying upon this policy of truth-seeking underpinning the federal rule condoning inconsistent pleadings, the Tenth Circuit in *Parkinson v. California Co., supra,* refused to apply the doctrine of judicial estoppel, stating that its use "would not be in keeping with the spirit of

. . . Rule 8(e)(2) . . . and would discourage the determination of cases on the basis of the true facts as they might be established ultimately." *See also Dugan v. EMS Helicopters, Inc.*, 915 F.2d 1428 (10th Cir. 1990); *Panama Processes, S.A. v. Cities Serv. Co.*, 796 P.2d 276, 286 n.43 (Okla. 1990).

Quite simply, a doctrine that does not permit a claimant to plead inconsistent positions in two separate actions is itself "inconsistent" with the rules that govern in all federal courts—rules (specifically Federal Rule of Civil Procedure 8(e)(2)) that clearly allow a litigant to make those same inconsistent averments in a single action before any federal court.

II. THE JUDICIAL ESTOPPEL DOCTRINE VIOLATES DUE PROCESS.

Denying plaintiffs their opportunity for a full and complete hearing on the facts of each case (such as that which occurs when a judge invokes the doctrine of judicial estoppel) also directly conflicts with the right to a jury trial provided by the Seventh Amendment to the United States Constitution. The continued use of this common law preclusion doctrine violates the intent of the Founders that the right to trial not vary from the right that existed in the common law at the time of the Seventh Amendment's ratification in 1791.

The doctrine of judicial estoppel did not find a place in the common law until it was recognized in 1857 by the Supreme Court of Tennessee, nearly seventy years and three generations of Americans after the ratification of the Seventh Amendment. Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of*

Judicial Estoppel, 80 Nw. U. L. Rev. at 1245 (1986). In no sense is judicial estoppel a traditional preclusion doctrine grounded in the common law of the sort which warrants continued deference by the courts. Certainly, denying a trial to a litigant on the basis of perceived untruthfulness would constitute a loss of the firm anchor the Founders provided to the Seventh Amendment, based in the common law as they then knew it. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. at 337-357 (1979) (Rehnquist, J. dissent).

III. IN THE CONTEXT OF DISABILITY CLAIMS, THE APPLICATION OF THE JUDICIAL ESTOPPEL DOCTRINE DENIES FUNDAMENTAL FAIRNESS AND DUE PROCESS TO SERIOUSLY INJURED AMERICANS GRANTED PROTECTION UNDER THE ADA.

Throughout history, the disabled have been viewed and treated differently than other members of society:

> Images of the disabled as either less or more than merely human can be found throughout recorded history. There is the blind soothsayer of ancient Greece, the early Christian belief in demonic possession of the insane, the persistent theme in Judeo-Christian tradition that disability signifies a special relationship with God. The disabled are blessed or damned but never human.

Alan Gartner and Tom Joe, *Images of the Disabled, Disabling Images*, Introduction, pp. 1-2 n.1.

In this country, the disabled have been viewed as morally inferior, medically afflicted, and socially deviant. Jonathan C. Drummer, Comment, *Cripples, Over-*

comers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities, 40 UCLA L. Rev. 1341, 1345-55 (1993). *See also* Frank Bowe, *Handicapping America: Barriers to Disabled People* (1978) (discussing prejudice, physical barriers, and negative attitudes generally suffered by persons with disabilities).

These misperceptions of persons who suffer disabilities have resulted in less employment opportunity and greater underemployment, as compared to the non-disabled population. Edward Gellen, *Disabled Concern: The Social Context of the Work-Disability Problem*, 67 Millbank Q. 114 (1989). *See also* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second Generation Civil Rights Statute*, 26 Harv. C.R.-C.L.L. Rev. 413, 422 (1991).

It was in the context of these unfortunate social and economic circumstances that Congress passed the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1994).[26] *See* Timony M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 440-42 (1991).

The concept of providing direct economic aid to the disabled, however, long preceded the passage of the ADA. The disability benefit programs incorporated in the provision of Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) are

[26] The espoused goals of the Act were to assure to persons with disabilities "equality of opportunity" and "economic self-sufficiency." 42 U.S.C. § 12101(a)(8).

based upon the reality that medical and psychological impairments do often cause an inability to work.

The interrelationships and perceived contradictions of these two separate but different statutory schemes relating to the disabled have been the subject of numerous well-considered commentaries and studies, and will undoubtedly be the focus of the submissions of the petitioner, as well as several *amici curiae*, including that of the governmental agencies who were invited by the Court to participate.[27] Accordingly, these issues will not be examined herein except to set the basis for concluding that there is no inherent contradiction between making payments to the disabled and encouraging equality in the workplace for persons with disabilities:

> One attempt to reconcile these policies is to view the two statutory schemes as serving different groups of people. Under this view, the disability benefit programs are for people who "cannot work," while the ADA is intended to protect disabled people who "can" work. This view divides disability policy into two mutually exclusive spheres—people with disabilities may receive the protection of one of these statutes, but not both.
>
> Many judicial decisions have reconciled the ADA with the disability benefit programs in this

[27] *See, e.g.*, Wendy Wilkerson, *Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act*, 38 S. Tex. L. Rev. 907, 913-915 (1997); Anne E. Beaumont, Note, *This Estoppel Has Got to Stop: Judicial Estoppel and the Americans with Disabilities Act*, 71 N.Y.U. L. Rev. 1529 (1996).

> way by holding that disability benefit recipients are estopped from maintaining suits against their former employers under the ADA. These courts view an award of disability benefits as a binding admission by the individual that he or she cannot work. These decisions, however, oversimplify the relationship between the ADA and the disability benefit programs. They fail to recognize that the findings that support an award of disability benefits are not necessarily inconsistent with the elements of a claim of employment discrimination under the ADA. Moreover, these cases fail to appreciate the unfairness of requiring people with disabilities to select one remedy rather than another when both statutes rely on broad standards whose application is difficult to predict.

Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 Tex. L. Rev. 1003, 1007-1008 (April 1998) (citations omitted).

As suggested in the detailed discussions above, judicial estoppel impedes a complete investigation of the facts in any case. However, the preclusionary effect of the doctrine is especially pernicious in the context of denying persons with disabilities who have also been forced to avail themselves of disability benefits any opportunity to be heard on the facts of an ADA claim.

It has long been the policy of American jurisprudence in that regard that a litigant's right to be heard will be carefully guarded when it involves a broad and beneficial public policy. More specifically, this Court has always sought to guard the protectionist intent of Congress in the context of civil rights acts. *See University*

of Tennessee v. Elliott, 478 U.S. 788 (1986) (Title VII complainant's right to trial not precluded by unreviewed state administrative proceeding) and *Astoria Federal S & L Ass'n v. Solimino*, 501 U.S. 104 (1991) (same re: age complainant). *See also Alexander v. Gardner-Denver Co.*, 415 U.S. at 49-51 (election of remedies doctrine not a bar to Title VII action based on prior arbitration under collective bargaining agreement).

The Court has also previously refused to allow preclusion where a trial was held to be necessary to vindicate important issues of public policy. *Perma Life Mufflers, Inc. v. Intern. Parts Corp.*, 392 U.S. 134, 136 (1968) (application of the *in pari delicto* doctrine reversed where it "threatens the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States"); *Brown v. Felsen, supra* (doctrine of collateral estoppel not a bar to subsequent action where its application would be inconsistent with the policies underlying the Bankruptcy Act).

More recently, this Court refused to apply an equitable preclusionary doctrine to deny a civil rights claimant the benefit of a full hearing on the issues. In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. ___, 115 S.Ct. 879 (1995), this Court has refused to allow the doctrine of "unclean hands" to prevent a plaintiff from pursuing claims filed under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*:

> The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of incidents or

> practices which violate national policies respecting nondiscrimination in the workforce is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misrepresentation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance.

McKennon, 513 U.S. at ___, 115 S.Ct. at 885 (1995).

This action by this Court was based upon the importance of upholding the broad public policy encompassed in the statutory scheme to protect employees in the workplace nationwide. Importantly, that framework of protection was held to include the provisions of the ADA. *McKennon*, 513 U.S. at ___, 115 S.Ct. at 884.

Contrary to this long line of authority, the Fifth Circuit Court of Appeals effectively denied Carolyn Cleveland's right to be heard by applying a doctrine of preclusion not unlike "unclean hands." Consistent with this Court's clear protection of civil rights policies, that action should not be upheld.

IV. OTHER EXISTING REMEDIES ARE ADEQUATE TO PROTECT LITIGANTS, THE COURTS, AND OUR SYSTEM OF JUSTICE FROM ABUSE.

Amici acknowledge that no litigation is "fair" unless it protects the interests of all parties. Certainly, employers in ADA cases are entitled to comprehensive protection from intentionally dishonest employees who undeservedly make claim to damages to which they are not entitled. That end, however, is not well served by the continued case of the doctrine of judicial estoppel:

> Judicial estoppel was developed to meet the perceived needs of protecting the judicial system at a time when rules of pleading were strict and unforgiving. In those days it could be forgiven, and might even have been necessary. But when the rules of pleading changed to reflect modern times, the doctrine of judicial estoppel was no longer necessary to protect those interests. Moreover, the doctrine conflicts with the policies behind the changed rules of pleading and is capable of working great injustices on litigants. Some courts have recognized these problems and have refused to apply the rule; others stubbornly hold on to it. But modern rules of evidence and attorney/litigant sanctions provide far better methods of protecting the interests that judicial estoppel sought to protect, while promoting the deeper policies behind the modern systems of pleading. For those reasons, judicial estoppel is a policy whose time has come and gone, and it, like common law and code pleading, should be consigned to the history books in any jurisdiction whose pleading system substantially parallels the Federal Rules of Civil Procedure.

Douglas W. Henkin, *Judicial Estoppel – Beating Shields Into Swords and Back Again*, 139 U. Pa. L. Rev. at 1755.

In this context, it is further enlightening that a recent study of the American Bar Association Commission on Mental and Physical Disability Law concluded that the prevailing axiom that the ADA unfairly favors employees was simply untrue, and that a review of over 1200 cases revealed that employers were successful 92 percent of the time. 22 *Mental and Physical Disability Law Reporter* 403 (1998). The report resolved that the rea-

sons employees tend to lose at such an alarming rate can be attributed to "two major 'catch-22's' that more often than not result in automatic dismissals of employment-related disability discrimination claims before those claims can be heard on the merits:"

> There is a fundamental catch-22 with respect to the ADA provisions that require a disability to be substantially limiting, while requiring employees with such a disability to be otherwise qualified to carry out essential job functions. In other words, employees have to have a severe enough disability, but it cannot be so severe that they are unable to do their job competently.
>
> * * *
>
> A second, less widespread but equally pernicious ADA catch-22 for those affected involves the doctrine of collateral estoppel. A number of courts have denied claims of employees with disabilities who have applied for or have received federal or state disability benefits-particularly social security and workers' compensation-which require applicants to assert that they are unable to work. Based on these assertions, some courts conclude that these employees are not otherwise qualified to carry out essential job functions. Thus, persons who lose their jobs because of disability discrimination may be forced to choose whether to file a discrimination suit, which may take a long time to resolve and in the interim would leave them without income, or file for disability benefits and risk undermining their discrimination claims.

Id. at 405.

In today's fora, litigant dishonesty is more appropriately dealt with by discretionary adherence to the panoply of established rules of procedure and evidence available to every trial court including:

(1) the admission of the perceived false statements as admissions of a party in interest in accordance with Federal Rules of Evidence 613 and 801(d)(1)-(2). *Parkinson v. California Co.*, 233 F.2d at 438; *see also Teledyne Industries, Inc.*, 911 F.2d at 1218 (noting reliance on Fed.R.Evid. 801(d)(1)(A) and 613); *Dockery*, 909 F.Supp. at 1559 (prior sworn statements in disability applications only "one more piece of evidence"); Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. at 1136 ("using a prior inconsistent statement as an admission is less drastic than precluding a change of position because the jury is not foreclosed from weighing the earlier position against the later one and deciding which represents the objective truth"); Rand G. Bowers, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U. L. Rev. at 1255 (impeachment better than "extreme measure of judicial estoppel");

(2) the use of Rule 11 of the Federal Rules of Civil Procedure which can be applied against both parties and their attorneys for pursuing frivolous suits or claims;

(3) the application of Rule 60(b) to reopen a judgment found to be inconsistent with the judgment of another court;

(4) the grant of summary judgment in cases where there is no reasonable basis to conclude that an ADA litigant is a qualified individual who can work with or without reasonable accommodation; and

(5) by reference of an intentionally dishonest claimant for action pursuant to statutory prohibitions against perjury.

By the use of one or more of these alternatives, which are currently available and provide a more reasoned and rational approach to a very controllable circumstance, no court need ever deny a civil rights claimant the right to a full hearing based on an anachronistic preclusionary doctrine.

CONCLUSION

It is respectfully suggested that the decision of the Court of Appeals for the Fifth Circuit should be reversed and the cause of Carolyn Cleveland under Title I of the Americans with Disabilities Act remanded for a full hearing on its merits.

Respectfully submitted,

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No. 97-1008

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998.

CAROLYN C. CLEVELAND,

Petitioner,

—v.—

POLICY MANAGEMENT SYSTEMS CORP., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AIDS POLICY CENTER FOR CHILDREN, YOUTH AND FAMILIES; AMERICAN ASSOCIATION OF RETIRED PERSONS; AMERICAN ASSOCIATION ON MENTAL RETARDATION; AMERICAN MEDICAL STUDENT ASSOCIATION; AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES; AMERICAN PUBLIC HEALTH ASSOCIATION; THE ARC OF THE UNITED STATES; ASSOCIATION OF NURSES IN AIDS CARE, *ET AL.*; AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

This *amici curiae* brief is submitted on behalf of AIDS Policy Center for Children, Youth and Families; American Association of Retired Persons; American Association on Mental Retardation; American Medical Student Association; American Network of Community Options and Resources; American Public Health Association; Arc of the United States; Association of Nurses in AIDS Care; Association for Persons in Supported Employment; Brain Injury Association, Inc.; Center for Independence of the Disabled in New York; Center for Women Policy Studies; Center on Disability and Health; Coalition for the Homeless; Coalition on Human Needs; Commission on Rehabilitation Counselor Certification; Committee for Children; Disability Rights Education and Defense Fund, Inc.; Disabled in Action of Metropolitan New York, Inc.; Employment Law Center; Epilepsy Foundation; Friends Committee on National Legislation; Gay and Lesbian Medical Association; HIV Law Project; Housing Works; International Association of Psychosocial Rehabilitation; Justice for All; Lambda Legal Defense and Education Fund, Inc.; Legal Action Center; LLEGÓ (The National Latina/o Lesbian, Gay, Bisexual & Transgender Organization); Mental Disability Law Clinic of Touro College; National AIDS Fund; National Association for People with AIDS; National Association of Protection and Advocacy Systems; National Association of Orthopaedic Nurses; National Council for Community Behavioral Healthcare; National Council of Jewish Women; National Health Law Program; National Minority Aids Council;

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[1] This brief has been authored in its entirety by undersigned counsel for the *amici*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

National Native American AIDS Prevention Center; National Partnership for Women and Families; National Senior Citizens Law Center; NETWORK; New York Lawyers for the Public Interest, Inc.; NISH; Parents, Families and Friends of Lesbians and Gays; Rehabilitation Engineering and Assistive Technology Society of North America; San Francisco AIDS Foundation; Title II Community AIDS National Network; Union of American Hebrew Congregations; and YWCA of the U.S.A. ("Disability, Medical, Public Health and Civil Rights Organizations"). The statements of interest of *amici* are included in the appendix to this brief.

Amici believe that this Court's ruling on the weight assigned to statements made by ADA Title I plaintiffs in applications for Social Security disability benefits will have a profound effect on the viability of the ADA as a tool to end pervasive job discrimination against persons with disabilities. The Fifth Circuit's application of a nearly insurmountable "rebuttable presumption" standard to such statements effectively bars millions of individuals with disabilities from ever showing, in the event of employment discrimination, that they are "otherwise qualified to perform the essential functions of the job."

By written consent of the parties,[2] *amici curiae* Disability, Medical, Public Health and Civil Rights Organizations submit this brief in support of Petitioner Carolyn C. Cleveland.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act (ADA) represents a fundamental evolution in policy affecting persons

[2] Letters of consent from all parties have been filed separately with the Clerk of the Court.

with disabilities. Explicitly rejecting the entrenched perception that persons with significant disabilities can never be fully independent participants in the national economy, the ADA protects employment opportunities for individuals with disabilities who are able to perform the jobs they hold or seek, and mandates that employers offer reasonable accommodations to assist in removing unnecessary impediments to employment.

The disability benefits programs of the Social Security Act (SSA), 42 U.S.C. 423, serve a social welfare purpose which complements the employment goals of Title I of the ADA. Offering benefits to those unable to engage in "substantial gainful activity" due to a serious physical or mental impairment, the Social Security Administration extends benefits to such individuals even if reasonable accommodations in a workplace would make employment possible.

The definitions and standards which determine eligibility for protection under Title I of the ADA, and for Social Security disability benefits, are quite different yet completely compatible. The ADA exists to remove barriers to the employment of people with disabilities while the SSA creates an economic support system for them in recognition of the continued existence of these barriers. While both statutes serve distinct purposes, their targeted beneficiaries overlap.

The Court of Appeals decision in this case undermines the policy and intent of the Americans with Disabilities Act by severely undercutting the ability of those with disabilities to enforce the ADA's promise of job equity. The ruling is at odds with those of other circuits, and with the position of the EEOC and the SSA, which are charged with administering the statutory provisions at issue. Under the Fifth Circuit's analysis, individuals with disabilities who are terminated under circumstances which include a refusal to reasonably accommodate them forfeit the possible return to employment

or other remedies for discrimination that an ADA claim would provide, merely by filing for subsistence benefits through SSA.

The Court of Appeals' decision skews the focus of the ADA's principal inquiry away from an employer's discriminatory conduct and onto a plaintiff's statements in an unrelated process with no bearing on the employer's conduct. Under the Court's "rebuttable presumption" standard, it is only "theoretically conceivable that under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive," 120 F.3d 513, 517. This standard is only superficially distinguishable from an absolute bar to an ADA claim, a distinction of no consequence to plaintiffs like Carolyn Cleveland, whose identification of specific accommodations that would allow her to perform her job was excluded from the Court's analysis.

Fair enforcement of the ADA remains the most viable tool for allowing individuals with disabilities who are capable of maintaining employment to avoid reliance on publicly-funded benefits programs. The "rebuttable presumption" standard employed here reduces the ADA's promised employment protections to a mere theoretical option for millions of individuals whose disabilities may periodically necessitate obtaining such benefits to survive. It also represents a radical misapplication of the principle of judicial estoppel and the standard for summary judgment.

There are important social implications of failing to recognize and disaggregate the distinct policies each statute advances. Rather than promoting attempts by individuals with disabilities to remain at or return to work, a goal shared by both systems, the Court of Appeals' holding re-erects barriers for employable individuals with disabilities by barring their enforcement of ADA rights when their attempts to move out of the benefits system into gainful employment result in discrimination.

Eligibility for the benefits of both the SSA and the ADA are not inherently inconsistent. Evidence of statements in support of claims under the SSA therefore warrant no special weight, and should be weighed equally with other relevant evidence, in determining the viability of an ADA claim.

ARGUMENT

I. IT UNDERMINES THE GOALS OF BOTH THE ADA AND THE SSA TO CREATE A PRESUMPTION OF ADA CLAIM ESTOPPEL ON THE BASIS OF A PLAINTIFF'S APPLICATION FOR SOCIAL SECURITY DISABILITY BENEFITS.

The purposes of the Social Security Act (SSA) and the Americans With Disabilities Act (ADA), while clearly distinct from each other, are complementary rather than conflicting. The SSA's method for qualifying applicants for benefits, and the ADA's determination of disability, diverge significantly in their approach, legal standards and statutory intent. At the same time, both statutes promote integration of people with disabilities into the economy whenever possible, a fundamental policy which the Court of Appeals' ruling implicitly overrides.

A. The ADA is a Civil Rights Law Designed to Eliminate Discriminatory Barriers to the Employment of People with Disabilities.

The Americans with Disabilities Act of 1990 is a landmark civil rights enactment for people with disabilities. It promotes a vision of the significant contributions that people with disabilities can make when given a fair chance to

participate fully in society.

The ADA provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities *and for the integration of persons with disabilities into the economic and social mainstream* of American life." *Id.*, quoting S. REP. No. 116, at 20; H.R. REP. No. 485(II), at 50 (emphasis in original).[3] The Act expanded coverage of the nondiscrimination principle to private employers and included an expansive list of potential reasonable accommodations to which people with disabilities might be entitled. *See* 42 U.S.C. § 12111(9) (listing possible reasonable accommodations under the ADA).

In its requirement that there be an "individualized assessment" of each claim that a particular individual with a disability is "otherwise qualified to perform the essential functions of the job," the ADA does not include the concepts of "total" disability and explicitly rejects generalized assumptions about the ability of a particular person with a disability to work. *See* Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 Tex.L.Rev. 1003, 1028 (1998). While the regulations recognize that there are some impairments which, by their

[3] The ADA's preliminary statement of findings concluded, in part that:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42.U.S.C. §12101(a)(7).

nature, may qualify as *per se* disabilities under the ADA[4], there are no presumptions about the effect of any impairment on an individual's ability to work.[5]

Congress' inclusion of reasonable accommodations in the ADA's definition of an "otherwise qualified individual" is a cornerstone of the ADA's attempt to assist individuals whose disabilities may impede, though not wholly foreclose, their ability to work. As the ADA's legislative history emphasizes, "the provision of various types of reasonable accommodations for individuals with various types of disabilities is essential to accomplishing the critical goal of this legislation - to allow individuals with disabilities to be part of the economic mainstream of our society." H.R. REP. No. 485(II), at 34.

By contrast, Social Security Administration policy prohibits hypothetical inquiries into possible reasonable accommodations in determining whether someone is unable

[4] *See* 29 C.F.R. Appendix to Part 1630, §1630.2(j) (EEOC Interpretive Guidance to Title I)(hereinafter "Interpretive Guidance") ("Other impairments...such as HIV infection, are inherently substantially limiting.")

[5] Indeed, the ADA contemplates that an individual can establish coverage under the Act with an impairment that *substantially limits* the major life activity of *working*. Under the ADA, a "disability" is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). The term "substantially limits" means "an inability to perform or a significant restriction on the ability to perform as compared to the average person in the general population;" "major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(j)(1) and 16.30.2(i); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633 (6th Cir. 1998).

to perform a range of jobs in the national economy.[6] Indeed, in 1994 the Social Security Administration directly addressed the question of the relevancy of the ADA to its determinations of disability and concluded that "the ADA defines `disability' in relation to the ability to perform what it describes as `major life activities.' Consequently, the term is not synonymous with `disability' as defined in the Social Security Act."[7] The SSA proposed and then rejected incorporation of ADA criteria into its determination of eligibility for benefits.[8]

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[6] Social Security determinations effectively operate on the assumption that reasonable accommodations are not available as a matter of course. A Social Security Administration Memorandum addressing the effect of the ADA on SSA's disability determination process states:

> The fact that an individual may be able to return to a past relevant job, provided that the employer makes accommodations, is not relevant to the issue(s) to be resolved at the fourth step [addressing ability to perform past work] of the sequential evaluation process. . . . [H]ypothetical inquiries about whether an employer would or could make accommodations that would allow return to a prior job would not be appropriate.

"Americans with Disabilities Act of 1990 -- INFORMATION," Memorandum from the Associate Commissioner, Social Security Administration 1 (Jun. 2, 1993).

[7] "Americans with Disabilities Act of 1990 -- INFORMATION," Memorandum from the Associate Commissioner, Social Security Administration 1 (Jun. 2, 1993).

[8] In hearings on the SSA "Reengineering" proposal, which would have required that beneficiaries be unable to work "regardless of any reasonable accommodation that an employer might make," commentators pointed out that the term:

> indicate[s] a basic misunderstanding of the relationship between the ADA and the disability standards under the Social Security Act. . . . [T]o establish a standard which assumes reasonable accommodations for the purpose of establishing eligibility for Social Security disability programs may potentially establish barriers for the individual by, in effect, *shifting the employer's*

Herein lies a fundamental difference between the ADA and the Social Security Act: an individual's general inability to work due to a disability (the point at which the SSA inquiry ends) triggers a subsequent inquiry under the ADA as to whether that inability can be remedied by an employer's reasonable accommodation. It is the very people who would be unable to work without reasonable accommodations -- thereby qualifying as disabled under the SSA's definition -- whom the ADA seeks to benefit by requiring their employers to provide accommodations.

The majority of jurists addressing the issue have recognized the differences between the two statutes. Most courts have concluded that while a plaintiff's experience with the SSA disability claims process may be relevant to the factual determination of her qualifications to perform the essential functions of the job at issue, it deserves no greater weight than other relevant evidence.

The Sixth, Seventh, Ninth, and D.C. Circuits all have rejected grants of summary judgment for employers which were based on the district courts' treatment of plaintiffs' applications for disability benefits as dispositive of a claim as a "qualified individual with a disability" under the ADA. *See Blanton v. Inco Alloys Int'l*, 123 F.3d 916 (6th Cir. 1997) (rejection of judicial estoppel and reversal of summary judgment); *Griffith v. Wal-Mart Stores, Inc.*, 930 F.Supp. 1167 (E.D. Ky. 1996), *rev'd on other grounds*, 135 F.3d 376

> *burden of compliance with the ADA* onto the claimant or potential employee.

A Proposal to Restructure the Social Security Administration's Disability Determination Process: Hearing Before the Subcomm. on Social Security of the House Committee on Ways and Means, 103rd Cong., 2nd Sess. 83 (1994) (statement of Martha E. Ford, Cochairperson, Consortium for Persons with Disabilities) (emphasis added). *See also id.* at 89-91 (statement of Professor Matthew Diller, Fordham University School of Law).

(6th Cir. 1998); *Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997) (citing "fundamental differences between the SSA's definition of disability and the ADA's definition of 'qualified individual with a disability,'"); *McCreary v. Libbey-Owens Ford Co.*, 132 F.3d 1159 (7th Cir. 1997); *Overton v. Reilly*, 977 F.2d 1190 (7th Cir. 1992) (refusing to dispose of fired employee's Rehabilitation Act claim on summary judgment; plaintiff's qualification for disability benefits did not mean he was not qualified to perform his job); *Johnson v. Oregon*, 141 F.3d 1361 (9th Cir. 1998); *Taylor v. Food World, Inc.*, 133 F.3d 1419 (11th Cir. 1998); *Talavera v. School Board,* 129 F.3d 1214, 1220 (11th Cir. 1998)("We agree with the majority of our sister circuits that a certification of total disability on an SSD benefits application is not inherently inconsistent with being a 'qualified individual with a disability' under the ADA."); *Whitbeck v. Vital Signs*, 116 F.3d 588, 591 (D.C. Cir. 1997) (application for benefits did not bar ADA claim where employer indicated unwillingness to accommodate); *Swanks* v. WMATA, 116 F.3d 582 (D.C. Cir. 1997). *See also D'Aprile v. Fleet Services Corp.*, 92 F.3d 1 (1st Cir. 1996) ("*August* stands for a much narrower proposition" that a plaintiff's ability to work, with reasonable accommodation if necessary, is an element of a disability discrimination claim."); *Anzalone v. Allstate Ins. Co.*, 1995 U.S. Dist. LEXIS 1272 (E.D. La. 1995), *aff'd*, 74 F.3d 1236, (5th Cir. 1995) (no summary judgment where plaintiff could perform job with accommodation).[9]

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[9] Numerous district courts have considered, and rejected, the argument that disability benefits applications provide overwhelming evidence of an ADA plaintiff's inability to work. *See, e.g., Sumner v. Michelin North America*, 966 F.Supp. 1567 (M.D. Ala. June 13, 1997) ("the simple fact that Sumner claimed he was disabled under the Social Security Act and permanently and totally disabled under Alabama's Worker's Compensation Act is not necessarily inconsistent with his claim for relief under the ADA") (granting summary judgment on other grounds); *Gilhuly*

The 10th Circuit repeatedly has rejected the doctrine of judicial estoppel altogether. *See, e.g., Aldrich v. Boeing Co.*, 146 F.3d 1265 (10th Cir. 1998); *Rascon v. U S West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998). Referencing its long-standing refusal to adopt the doctrine, the court in *Rascon* "join[ed] the majority of circuits [in holding] that statements made in connection with an application for social security disability benefits cannot be an automatic bar to a disability discrimination claim under the ADA." 143 F.3d at 1331.

The 10th Circuit *Rascon* and *Aldrich* decisions provide a reasonable and well-supported model for determining the weight courts should give to an individual's statements in an

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v. Consolidated Rail Corp., 1997 U.S. Dist. LEXIS 13454, at *23 (E.D. Mich. 1997) (no judicial estoppel where employer failed to engage in interactive, reasonable accommodation process); *Kacher v. Houston Community College System*, 974 F. Supp. 615 (S.D. Tex. 1997) (receipt of insurance benefits during period of incapacity not inconsistent with subsequent ability to work); *Norris v. Allied-Sysco Food Services, Inc.*, 948 F. Supp. 1418 (N.D. Cal. 1996) (application for long-term disability insurance benefits not inconsistent with plaintiff's claim that she subsequently recovered and was qualified to return to work); *Pressman v. Brigham Medical Group, Inc.*, 919 F. Supp. 516 (D. Mass. 1996) (genuine issue of fact as to whether "total disability" for the purposes of disability insurance meant plaintiff was unable to perform the essential functions of medical practice); *Harrison v. Delaware*, No. 95-406-SLR, 1996 U.S. Dist LEXIS 20541 (D. Del. 1996) (plaintiff's claim not barred by application for disability pension filed after employer's failure to respond to accommodation request); *Mohamed v. Marriott Int'l, Inc.*, 944 F. Supp. 277, 280-84 (S.D.N.Y. 1996) ("uncritical application of judicial estoppel" fails to recognize significant differences in ADA's and Social Security Act's applicable legal standards, and the differences between ADA forum and procedures, and SSDI administrative determinations and policy goals); *Parish v. Consolidated Engineering Lab*, No. C96-4213 MMC, 1997 U.S. Dist. LEXIS 15879 (N.D. Cal. Oct. 6, 1997) (receipt of state disability benefits not inconsistent with claim of improved health while on leave) (summary judgment granted on other grounds).

application for disability benefits when that individual asserts in an ADA employment discrimination claim that she is a "qualified individual with a disability." In rejecting the applicability of both the *per se* judicial estoppel rule of *McNemar v. The Disney Store*, 91 F.3d 610 (3rd Cir. 1996), *cert. denied* 117 S.Ct. 958 (1997), and the Fifth Circuit's use of a rebuttable presumption of judicial estoppel in this case, the 10th Circuit did not bar the introduction of such statements at trial, nor did it otherwise alter the burden on plaintiff in establishing her *prima facie* case as set forth in this Court's decision in *McDonnell Douglass Corp. V. Green*, 411 U.S. 792, 802 (1973). In *Aldrich*, the court explained why it found unpersuasive the defendants argument that Kenneth Aldrich should be estopped from pursuing his ADA claim due to his testimony at a workers' compensation hearing that he could not perform his job with or without reasonable accommodation:

> Were we to adopt [defendant's] approach...we would "discourage the determination of cases on the basis of the true facts as they might be established ultimately." *United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986)(quoting *Parkinson v. California Co.*, 233 F.2d 432, 438 (10th Cir. 1956)). The Federal Rules of Evidence well provide the means with which to confront plaintiff with such inconsistency. *See* Fed.R.Evid. 801(d)(2)(permitting introduction in evidence of prior admission by party-opponent). Thus Aldrich's testimony "may constitute evidence relevant to a determination of whether the plaintiff is a 'qualified individual with a disability,'" *Rascon* at 1332, but it is not dispositive.

146 F.3d at 1268-69.

The persistent confusion among some courts as to the

appropriate consideration of disability benefits claims prompted the EEOC to issue Enforcement Guidance on benefits applications and the ADA.[10] In a comprehensive analysis of the differing purposes of the ADA and the SSA and other public and private disability benefits programs, the EEOC concluded that representations made in an application for disability benefits are *never* dispositive of whether a claimant is a "qualified individual with a disability" under the ADA. EEOC Enforcement Guidance at 26. Based on the distinct yet complementary purposes, standards and defining terms of the ADA and the SSA, the EEOC reasoned that application of judicial estoppel or summary judgment to dispose of an ADA claim based on a plaintiff's benefits claims experience is inappropriate. *See* EEOC Enforcement Guidance at 27-30.

Similarly, the Social Security Administration, which undoubtedly has a significant interest in preventing fraud in SSA disability benefits claims, made it clear in *Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582 (D.C. Cir. 1997), that it agreed with the EEOC that the receipt of Social Security disability benefits does not bar ADA claims. Remarkably, the Court of Appeals' *Cleveland* decision below, issued months after publication of the EEOC Enforcement Guidance and the *Swanks* decision, does not even acknowledge the existence of either the Guidance or the Social Security Administration's position taken in *Swanks*.

This Court's recent decision in *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998) provides clear guidance on the weight to be afforded relevant federal authorities in resolving conflicts as

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[10] EEOC, *Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a "Qualified Individual with a Disability" Under the Americans with Disabilities Act of 1990 (ADA)*, ADA Compliance Manual Section 915.002 (Feb.12, 1997)(hereinafter "EEOC Enforcement Guidance").

to the proper interpretation of the ADA. In *Bragdon*, this Court observed that "the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Id.* at 2206, *citing Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). The EEOC is the agency directed by Congress to issue regulations implementing Title I of the ADA, *see* 42 U.S.C. §12116, to render technical assistance explaining the responsibilities of covered individuals and institutions, *see* 42 U.S.C. §12206(a) and (c), and to enforce Title I in the courts, *see* 42 U.S.C. §12117(a). Accordingly, its views are entitled to deference. *Bragdon*, 118 S.Ct. at 2208.

The ADA's requirement of an "individualized assessment" of each plaintiff's ability to do the job in question, and its overarching purpose of providing a real remedy to disability-based discrimination in employment, clearly militate against adoption of judicial estoppel based on "rebuttable presumptions" to foreclose the weighing of disputed facts which are central to ADA claims.

B. Social Security Disability Benefits Are Part of a Broad Social Welfare Program Whose Eligibility Standards and Determinations Differ From the ADA's.

Congress has enacted two programs designed to provide income to those whose impairments interfere with their ability to work: the Social Security Disability Insurance program ("SSDI")[11] and the Supplemental Security Income

[11] Codified at 42 U.S.C. §§413-415. SSDI, like earlier Social Security benefit programs, bases eligibility in part on an individual's work record. 42 U.S.C. §423(c).

program ("SSI").[12] The aim of both programs is to provide a federally financed floor of income to those whose impairments prevent them from maintaining economic independence and self-support.[13]

There are important differences between the SSA and the ADA in the criteria used to determine coverage under each statute. The Social Security Administration considers whether an individual's overall functional capacity renders him or her unable to perform any jobs that exist "in substantial numbers in the national economy."[14] The SSA considers the ordinary work requirements of entire classes of jobs, without allowing for individualized modifications that

[12] Codified at 42 U.S.C. §§1381-1383d. SSI is a needs-based program that considers income and resources, in addition to level of impairment, in determining eligibility.

[13] "Federal disability payments, even when supplemented by other forms of disability compensation, provide families of disabled persons with the basic means of getting by." *Richardson v. Belcher*, 404 U.S. 78, 91 (1971) (Marshall, J., dissenting); *see also* 42 U.S.C. §1381 (SSI program statement of purpose).

[14] Determination of eligibility for Social Security disability benefits is generally based on a sequential, five-step process of evaluation, i.e., 1) whether the claimant is currently engaged in substantial gainful employment; 2) whether the claimant has a severe impairment; 3) whether the impairment is equivalent in severity to one included on the SSA's "Listing of Impairments," set forth in 20 C.F.R. Part 404, Subpart P, App. 1; 4) whether the claimant can perform past relevant work; and 5) whether the claimant is able to engage in other forms of employment which exist in significant numbers in the national economy. 42 U.S.C. §423 (d)(2)(A); 20 C.F.R. 404. 1520 (b), .1520 (c), .1521, .1520 (d), .1525, .1526, .1520 (e), .1520 (f), .1520 (c). If the claimant's impairment is equivalent to one included in the Listing, SSA awards benefits without further inquiry, in steps 4 and 5, into the claimant's ability to work. *See Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987) and discussion at I.D., *infra*.

could accommodate the disability in question.[15]

In contrast, the ADA provides protection from discrimination in the terms or conditions of employment based on the individual's substantially limiting condition, a history of the same, or an employer's perception of an individual as disabled.[16] It also differs from the SSA in two additional, and critical, respects. First, when evaluating whether an individual suffered prohibited workplace discrimination, the ADA considers exclusively a *particular job*,[17] its essential functions,[18] and an individual's demonstrated qualifications to perform them.[19] Second, if the individual's disability interferes with the ability to perform a

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[15] *Compare* 20 C.F.R. § 404.1566 (defining "work which exists in the national economy") *with* 29 C.F.R. § 1630.2(o)(1)(ii) (defining reasonable accommodation to include modifications of jobs as they are customarily performed).

[16] 42 U.S.C. § 12102(2).

[17] The ADA defines a "qualified individual with a disability" with reference to the "employment position such individual holds or desires." 42 U.S.C. § 12111(8).

[18] 42 U.S.C. § 12111(8). The employer's judgment as to what are the "essential functions" of a job are not dispositive, *id.*; a court's determination of the issue "should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved." *Hall v. United States Postal Service*, 857 F.2d 1073 (6th Cir. 1988) (interpreting the term under the Rehabilitation Act §§ 501 and 503).

[19] Only in rare circumstances would capacity to do other jobs in the national economy be a relevant consideration under the ADA. Inquiry as to a plaintiff's ability to perform other jobs is generally limited to the geographic area to which he or she lives or works, and arises only when the plaintiff argues that working itself is the sole "major life activity" in which he or she is "substantially limited" by a disability. *See* 29 C.F.R. § 1630.2(j)(3).

job's essential functions in the manner they routinely are done, the ADA requires consideration of whether reasonable accommodations will facilitate performance of these functions.

C. The Presumption That an SSA Benefit Claimant Cannot Be a "Qualified Individual" Under the ADA Undermines Both Systems' Shared Goal of Encouraging the Employment of People with Disabilities Whenever Possible.

Even though the definitions, inquiries and requirements of the two statutes differ markedly, they share the common policy goal of encouraging people with disabilities to work whenever possible. Federal disability assistance, while recognizing that thousands of Americans require public support when disabilities prevent them from working, simultaneously incorporates a variety of rehabilitative and work-incentive programs. In fact, in the Social Security Administration's manual of instructions to staff completing and processing SSI and SSDI application forms, staff are required during their interview with each claimant to explain that "work activity will not necessarily stop or reduce benefits."[20] It is manifestly unfounded to

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[20] Social Security Administration, Program Operations Manual System ("POMS") DI 10005.001 (K). The relevant section of the POMS states:

> Explain to claimants that work activity will not necessarily stop or reduce benefits. There are program rules which exist to encourage people to return to work by allowing them to keep all or part of their benefits for a reasonable time. Give the individual a copy of the leaflet, "Disability Benefits and Work" . . . Point out that some of these rules will, in effect, allow the program to cover some of the costs of returning to work . . .

Id.

suggest, as the *Cleveland* decision does, that plaintiffs such as Carolyn Cleveland who rely on the explicit guidance of federal agency personnel are perpetrating a fraud on the courts. For example, disability payments may continue where recipients participate in vocational rehabilitation programs which the Commissioner determines "will increase the likelihood that such individual may . . . be permanently removed from the disability benefit rolls." 42 U.S.C. § 425(b)(2). In publicizing the availability of its various work incentive options, the Social Security Administration warrants that "[e]nabling beneficiaries with disabilities to achieve a better and more independent lifestyle by helping them take advantage of employment opportunities is one of SSA's highest priorities."[21] Inasmuch as the safety-net system of the SSA does not attach a permanent presumption of unemployability to its benefits recipients, it is patently inappropriate for the federal courts to do so.

The Social Security Act's numerous work incentive provisions include 1) the Trial Work Period, which allows beneficiaries to work for nine months while their benefits entitlement and payment levels remain unchanged; 2) the

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[21] Dep't of Health and Human Services, Social Security Administration RED BOOK ON WORK INCENTIVES, SSA Pub. No. 64-030 (1994). SSA's "Red Book" states further:

> The SSDI and SSI programs should not be viewed as exclusive and permanent sources of income to the person with disabilities. They should, in every case possible, be used as stepping stones to improving a person's economic condition.
>
> Work incentives are intended to give beneficiaries the support they need to move from benefit dependence to self-sufficiency.
>
> [W]ork incentives . . . are designed to help people with disabilities enter or reenter the workforce by protecting their entitlement to cash payments and/or Medicaid or Medicare protection, until they can support themselves.

Id. at 2, 3.

Extended Period of Eligibility, which provides individuals who return to work with benefits in any month in which earnings fall below a statutory level; 3) the Plans for Achieving Self Support, which exempts income and resources set aside for an approved work goal, such as education, from counting toward statutory minima for SSI eligibility; 4) the Impairment-Related Work Expenses provisions, which allow deductions against earnings for participants with impairment-related expenses which are necessary to return to work; and 5) the continuation of cash payments and Medicaid coverage to individuals who return to work whose earnings would otherwise remove them from coverage. Other provisions eliminate waiting periods for people who go off disability as a result of a work attempt but later find they need to re-enroll for benefits; and extend Medicare eligibility for people successfully returning to work.[22] Program beneficiaries utilize these programs widely: one study found that a *full twenty-two percent* of SSI recipients worked in some capacity after they applied for disability payments.[23] Contrary to the Court of Appeals' presumption, participating in the working world when feasible with maintaining one's determination of eligibility as "disabled" under the Social Security system. In fact, it is actively encouraged and rewarded by the Social Security Administration.

Placing rights under the ADA and the SSA in conflict has profound consequences for the larger public interest in employing those able to move from subsidy to work. If a worker or job applicant is accommodated in a job that

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[22] *See* L. Scott Muller, *Disability Beneficiaries Who Work and Their Experience Under Program Work Incentives*, 55 SOC. SEC. BULL. 2, 16-17 (Summer 1992); Donald E. Rigby, *Note, SSI Work Incentive Participants, September 1991*, 54 SOC. SEC. BULL. 22, 22-23 (Dec. 1991).

[23] Charles G. Scott, *Disabled SSI Recipients Who Work*, 55 SOC. SEC. BULL. 26, 34 (Spring 1992).

constitutes "substantial gainful activity," he or she will become ineligible for benefits under SSA regulations. *See* 20 C.F.R. § 404.316. Thus, if applied as intended, the ADA can decrease the number of individuals receiving disability benefits.[24] More importantly, maintaining employment is both important and possible for people with chronic diseases and episodic periods of debilitation. For those whose symptoms of their disability ebb and flow, an employer's provision of reasonable accommodations may be pivotal in enabling them to continue working after diagnosis.[25] In this case, Carolyn Cleveland's post-termination application for disability benefits, used by defendant to "prove" that Cleveland was not qualified for her job, was necessitated by a deterioration in her condition allegedly triggered by defendant's denial of accommodations and firing of her. *See*

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[24] Frank S. Ravitch, *Balancing Fundamental Disability Policies: The Relationship Between the Americans with Disabilities Act and Social Security Disability*, 1 GEO. J. ON FIGHTING POV. 240, 247-48 (1994). It has been estimated that work disability costs the economy approximately $111.6 billion annually in direct and indirect medical costs and lost wages alone. Centers for Disease Control and Prevention. *Prevalence of Work Disability -- United States, 1990*, 270 JAMA 1921 (Oct. 27, 1993). The express purposes of the ADA include elimination of "unnecessary expenses resulting from dependency and non-productivity. 42 U.S.C. §12101(a)(9). Senator Harkin predicted that "enactment of the ADA will save billions of dollars per year that are currently being expended on social welfare programs," 135 CONG. REC. S10713 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin), due to increased employment and reduced dependence on Social Security for financial support.

[25] Researchers have found that when such employees are able to control the pace and schedule of their work, one possible reasonable accommodation, they are less liable to be forced to leave employment due to the effects of their illness than those who cannot. Edward H. Yelin, *The Recent History and Immediate Future of Employment Among Persons with Disabilities*, 69 MILBANK Q. 129, 142 (1991).

120 F.3d at 514-515. In fact, a credible claim of changed circumstances, particularly when caused by the employer, is an independent reason not to preclude proof of changes in the ability to work in an ADA claim. *D'Aprile v. Fleet Services Corp.*, 92 F.3d 1, 4 (1st Cir. 1996).

The Fifth Circuit appears to assume, however, that reasonable accommodations rarely make the difference between ability to work and inability to work -- that such circumstances are only "theoretically conceivable" and "limited and highly unusual." 120 F.3d at 517. On the contrary, Social Security Administration research shows that 42% of SSDI recipients who went to work while receiving benefits had some kind of accommodation.[26] The approach endorsed in *Cleveland* likely will discourage compliance with the reasonable accommodation and nondiscrimination mandates of the ADA, as employers recognize that many people with the financial and medical needs of a disability have to resort to Social Security in order to avoid the dire consequences of job loss on health and solvency.[27]

The Court of Appeals' decision directly undermines the goal of both systems to foster employment opportunity. It undercuts employers' responsibilities to help integrate and retain people with disabilities in the workplace and fosters dependence on government entitlements, despite the drafters' clear intention that people receiving disability benefits who wish to work are the very individuals who most need the protection and intervention of the law when seeking economic

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[26] John C. Hennessey & L. Scott Muller, Work Efforts of Disabled-Worker Beneficiaries, 57 Social Security Bulletin 42 (1994). A copy will be lodged with the Clerk. *See also* Diller at 1046-47 and 1055-56.

[27] In 1995, over seven million of the forty-two million Americans with disabilities received either SSI or SSDI. *See Hearing on Growth in Social Security Programs Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 104th Cong., 1st Sess. (1995).

self-sufficiency. Congressional creation of vocational rehabilitation and work incentive programs for those with disabilities are rendered futile when discrimination persists in preventing gainful employment.[28]

D. Most SSA Benefits Awards Do Not Hinge on an Individual Assessment of An Applicant's Ability to do Past or Current Work.

An important aspect of the *Cleveland* court's apparent misapprehension of the SSA disability benefits award process is its failure to recognize the Social Security Administration's reliance on a "Listings of Impairments," 20 C.F.R. Pt. 404, Subpt. P, App. 1, to determine a claimant's ability to work without an individualized assessment of the extent to which a particular claimant's impairment actually limits the ability to work.

The ADA largely repudiated a system of presumptions; Congress instead adopted a functional analysis of ability to work that requires a fact-specific, case-by-case determination. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g)-(l). Under SSA regulations, however, an individual who currently is not working or producing an average monthly wage of $500, and who has an impairment equal in severity to one included in the Listings, is deemed eligible for disability benefits without a further assessment of the individual's ability to work. 20 C.F.R. §404.1520(d) (1998).[29] The Social

[28] As this Court noted when commenting on the enactment of §504 of the Rehabilitation Act, "Congress recognized that vocational rehabilitation of the handicapped would be futile if those who were rehabilitated could not obtain jobs because of discrimination. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 633 n. 12 (1984).

[29] The listings consist of medical criteria for certain disorders for each of the major body systems, identifying more than 150 categories of

Security Administration relies on a catalogue of severe impairments which, when medically documented, *replaces* an assessment of the impairment's impact on an applicant's ability to work. Diller, *infra*, *Dissonant Disability Policies* at 1038.

The award of SSA disability benefits in such cases does not amount to a finding that the individual is unable to work. Rather, the award of benefits reflects the underlying policy that individuals whose impairments are sufficiently severe warrant an exemption from the societal obligation to maintain economic independence through "substantial gainful employment." While a court should consider approval of benefits powerful support for the first part of an ADA plaintiff's prima facie case — that the person is an individual with a disability — the benefits application or approval gives no indication of whether that individual is qualified to perform the essential job functions of a particular job with or without a reasonable accommodation. According to a 1993 Congressional publication, more than *half* of all SSA disability benefits awards are based on the Listings. *See* Committee on Ways and Means, 103rd Cong., Overview of Entitlement Programs: 1993 Green Book 57 (Comm. Print 1993). In most cases in which benefits are awarded, then, SSA has not considered the applicant's ability to work. *See* Diller, *infra*, Dissonant Disability Policies at 1039. This system of presumed disabling impairments, unlike the ADA, combines the medical criteria of certain long-term impairments with the presumption of an inability to work.

Consideration of some of those conditions which SSA includes in its Listing of Impairments helps to illustrate both

medical conditions that are sufficiently severe in SSA's view to ordinarily prevent a person from engaging in "substantial gainful activity." 20 C.F.R. §404.1525(d); *see also* EEOC Enforcement Guidance at 11, fn 41.

those types of conditions which SSA deems sufficiently severe to relieve an affected individual of the obligation to work, and the compatibility between a finding of benefits eligibility and an ability to work with or without accommodations. For example, paraplegia (the loss of use of both hands or feet), blindness (e.g., central visual acuity of 20/200 or less with correcting lenses), severe hearing loss and loss of speech all are "listed" impairments which qualify one for presumptive eligibility for disability benefits under SSA regulations, *see* 20 C.F.R. Pt. 404, Subpt. P, App. 1, §1.09, 2.02, 2.04, 2.08, 2.09, yet clearly individuals with one or more of these conditions might be a "qualified individual with a disability" with or without reasonable accommodations under the ADA. *See also* EEOC Enforcement Guidance at 11-12, fn 41. A person with chronic anemia requiring a blood transfusion once every two months also is presumed eligible for Social Security disability benefits, *see* 20 C.F.R. Pt. 404, Subpt. P, App. 1, §7.02; such a person, however, might secure accommodation of transfusion needs and fluctuating energy levels and consequently maintain employment. Mental retardation (determined in part by an IQ score of less than 59) also is included in the Listings, *see* 20 C.F.R. Pt. 404, Subpt. P, App. 1, §9.09, yet a person with this degree of mental retardation is able to work in many cases.

Presumptive determinations under Social Security also include many people with AIDS. 20 C.F.R. Pt. 404, Subpt. P, App. 1. At the same time, a basic aspect of HIV-related disease remains its unpredictability, and the ability of a person with AIDS to work may fluctuate. After an opportunistic infection or other illness has passed, the same person whom Social Security defines as totally "disabled" under its presumptive criteria may once again be able to work, with or without reasonable accommodation.

Much like the impairment Carolyn Cleveland suffered, sensory or motor aphasia which interferes with effective

communication following a central nervous system vascular accident, also qualifies for presumptive eligibility for benefits. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, §11.04. Cerebral palsy and epilepsy also can satisfy the requirements of the Listings for presumptive eligibility. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, §§11.02, 11.07. All individuals with any of these conditions at the listed level of severity are presumed, under SSA, unable to maintain self-sufficiency and eligible for disability benefits; *none* are presumed unable to work under the ADA.

Because "disability" is a term of art which differs under the two statutes, a claim that an individual is disabled for the purposes of one statute cannot be determinative of whether that individual is also disabled for purposes of the other.[30]

II. IMPOSING PRESUMPTIVE INELIGIBILITY FOR ADA PROTECTIONS ON THOSE WHO APPLY FOR DISABILITY BENEFITS CREATES BARRIERS TO FAIR ENFORCEMENT OF THE ADA THROUGH A DISTORTION OF THE PRINCIPLE OF ESTOPPEL AND THE STANDARD FOR SUMMARY JUDGMENT.

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[30] *See, e.g., Overton v. Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992)("[A] finding [of disability] is consistent with a claim that the disabled person is `qualified' to do his job under the Rehab Act. First, the SSA may award disability benefits on a finding that the claimant meets the criteria for a listed disability, without inquiring into his ability to find work in the national economy. . . . Second, even if the SSA had looked into Overton's ability to find work in the national economy, its inquiry would necessarily be generalized. The SSA may determine that a claimant is unlikely to find a job, but that does not mean that there is no work the claimant can do.").

Traditionally, the doctrine of judicial estoppel has been confined to situations in which the same litigant takes opposing factual positions before the same tribunal, to prevent litigants from "playing fast and loose with the courts."[31] The Court of Appeals and the court decisions it parallels have significantly stretched the doctrine beyond its supportable boundaries.

Relying on an estoppel theory to preclude claimants from presenting supporting evidence to a jury on a central issue of fact -- their ability to perform, with reasonable accommodation, the essential functions of the job in question -- is especially inappropriate. The standard for a summary judgment motion, that there be "no genuine issue as to any material fact," Fed. R. Civ. P. 56(c), certainly is not met when plaintiff and defendant are in dispute over whether the plaintiff is otherwise qualified for the job, a question of fact which is central to the outcome of the proceedings. Statements which, at most, may appear to the Court to controvert the employee's current position are no different than the vast array of impeachment evidence presented at trial which the fact finder must weigh.

A fundamental principle of Fed. R. Civ. P. 56 is that the evidence, and inferences that may be drawn from it, must be construed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The Fifth Circuit's rebuttable presumption of estoppel turns this principle on its head. It construes the inferences that may be drawn by the plaintiff's statements in support of disability

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[31] For example, the Third Circuit's *pre-McNemar* standard for judicial estoppel enunciated in *Scarano v. Central R.R.*, 203 F.2d 510, 513 (3d Cir. 1953), requires contrary positions taken by the same litigant, in front of the same court and the same adversary from which she already obtained relief. Because the doctrine seeks to protect the integrity of the judicial system, *id.*, only statements made in front of adjudicative tribunals should be relevant.

benefits as fatal to her *prima facie* case, allowing plaintiff to overcome presumptive estoppel in only the rarest of cases. The rebuttable presumption that Carolyn Cleveland's statements related to her SSA claim estop her from making her ADA case also is at odds with the view expressed by other circuits, and this Court, that the larger goal of rooting out employment discrimination dictates caution in disposing of such cases at summary judgment. The reasoning of the D.C. Circuit in *Aka v. Washington Hospital Center*, 116 F.3d 876 (D.C. Cir. 1997) is instructive:

> Our review of grants of summary judgment on claims of employment discrimination involves two further considerations. First, because employment discrimination claims center on the issue of an employer's intent, and "writings directly supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers," an added measure of "rigor," or "caution," is appropriate in applying this standard to motions for summary judgment in employment discrimination cases. Courts reviewing such motions must bear in mind that a fact finder could infer intentional discrimination even in the absence of crystal-clear documentary evidence filed at the summary judgment stage. [citations omitted].

Id. at 879-880. The Ninth Circuit relied on similar reasoning when it reversed summary judgment for defendant in an age discrimination claim in *Schnidrig v. Columbia Mach.*, 80 F.3d 1406 (9th Cir. 1996). Noting it's high standard for the grant of summary judgment against plaintiffs in employment discrimination cases, the court explained that it requires "very little evidence" to survive summary judgment in such cases "because the ultimate question is one that can only be

resolved through a 'searching inquiry' — one that is most appropriately conducted by the fact finder, upon a full record."[citations omitted] *Id.* at 1410. This Court also has recognized the overarching public policy reflected in federal antidiscrimination laws that should guide courts in summary dismissal of cases. In *McKennon v. Nashville Banner Publishing Co.* 513 U.S. 352 (1995), the trial court had dismissed an ADEA claim based on the employer's discovery, after the plaintiff's discharge, that the latter had committed misconduct sufficiently serious to provide an independent basis for her firing. In a unanimous opinion reversing the dismissal, Justice Kennedy stated:

> The ADEA, enacted in 1967 as part of an ongoing Congressional effort to end discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. *See* Title VII...; the Americans with Disabilities Act...; the National Labor Relations Act...; the Equal Pay Act...[citations omitted]
>
> The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of ...practices which violate national policies is itself important...The efficacy of its enforcement mechanisms becomes one measure of the success of the Act.

Id. At 884-85.

Where the record, as here, contains evidence that the plaintiff has a disability and is capable of performing her job duties with reasonable accommodation, statements made to the Social Security Administration that she has a disabling

condition which has precluded her employment do not support a motion for summary judgment.[32] To use a vague and contextually dependent statement that an individual is "totally disabled" or "unable to work" under a different scheme to grant summary judgment on an ADA claim divests the jury of a critical function, the weighing of evidence.

Utilization of judicial estoppel should reflect its original and limited objective -- the elimination of intentionally fraudulent behavior before judicial tribunals. Requiring that courts rely on an individualized factual determination of plaintiff's ability to satisfy the essential requirements of a particular job does not deprive the fact finder of the opportunity to consider the plaintiff's experience with disability benefits programs. *Amici*'s position here is not that the application for or receipt of SSA disability benefits is irrelevant to a determination of a plaintiff's prima facie case; rather, it is *amici*'s position that a plaintiff's experience with disability benefits claims cannot be *dispositive* of the case.

Legal constructions such as the Fifth Circuit's "rebuttable" presumption that disability benefit claimants are estopped from challenging workplace discrimination have stunted any significant development of legal protection for people with disabilities. In a report released earlier this year, the American Bar Association's Commission on Mental and Physical Disability Law found that employers prevailed in 92% of the court rulings under the ADA where a final decision was reached. *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints,* Mental and Physical Disability Law Reporter at 407 (May-June 1998). As the ABA reports, "The facts strongly suggest . . . [that] employees are treated unfairly under the act due to myriad legal technicalities that more often than not prevent the issue

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[32] *See Talavera v. School Board*, 129 F.3d 1214 (11th Cir. 1997); *Aldrich v. Boeing*, 146 F.3d 1265 (10th Cir. 1998).

of employment discrimination from ever being considered on the merits by an administrative or judicial tribunal." *Id.* This Court's reversal of the decision below is necessary to avert reformulation of the ADA as a theoretical tool, rather than an actual one, for redressing the systemic discrimination which qualified individuals continue to confront.

CONCLUSION

The decision of the Court of Appeals should be reversed and remanded, and the fact finder permitted to hear and weigh all of the evidence relevant to Cleveland's Title I claim.

Respectfully Submitted,

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APPENDIX

APPENDIX

AIDS Policy Center for Children, Youth & Families is a non-profit organization founded in 1994 to help respond to the unique concerns of HIV positive and at-risk children, youth, women and families and their service providers. AIDS Policy Center conducts policy research, education and advocacy on a broad range of HIV/AIDS prevention, care and research issues. Organizational members include over 350 community-based agencies in 27 states, the District of Columbia and Puerto Rico. Individual members include young people, women and family members throughout the United States. Many of AIDS Policy Center's members provide or receive services funded by Title IV of the Ryan White CARE Act.

American Association of Retired Persons ("AARP") is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-two million members are employed. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has, since 1985, filed more than 150 *amicus* briefs before this Court and the Federal appellate and district courts.

The American Association on Mental Retardation ("AAMR") is the nation's oldest and largest interdisciplinary organization of professionals who work with people with mental retardation and other developmental disabilities in both institutional and community settings. AAMR develops human resources and leadership, promotes high quality services and supports that enable full community inclusion and participation, encourages research and its dissemination and application, advocates for progressive public policies, and

influences public awareness and attitudes. The mission of the AAMR is to enhance the opportunities, human rights and choices of people with mental retardation and their families by exchanging information that advances the skills and knowledge of individuals in the field.

The American Medical Student Association ("AMSA") is an independent student-run organization of nearly 30,000 physicians-in-training members from 143 allopathic and 17 osteopathic medical schools across the country. Founded in 1950, AMSA is committed to improving health care and health care delivery to all people, promoting active improvement in medical education, involving its members in the social, moral and ethical obligations of the profession of medicine, assisting in the improvements and understanding of world health problems, contributing to the welfare of medical students, interns, residents and post MD/DO trainees, and advancing the profession of medicine. AMSA believes the burden of proof of judgment, reliability, capability, or entitlement to a position for individuals with a disability should not be greater than or different from that placed on other persons.

The American Network of Community Options and Resources ("ANCOR") is the national organization representing 650 private providers of supports and services to more than 150,000 people with mental retardation and other disabilities in assisting them to live, work, and recreate in the community. Many of the individuals to whom ANCOR members provide supports depend upon Supplemental Security Income and Social Security Disability Income as their sole source of income in order to ensure appropriate housing, health coverage, and other needed supports. Although there are increasing opportunities for more people with disabilities to obtain some level of employment, their

disability is not eliminated by part-time or full-time employment.

The American Public Health Association ("APHA") is a national organization devoted to the promotion and protection of personal and environmental health. Founded in 1872, APHA is the largest public health organization in the world, representing over 50,000 public health professionals. It represents all disciplines and specialties in public health. APHA supports the goal of equalization of opportunities for mentally and physically disabled persons in every facet of life.

The Arc of the United States, a national organization on mental retardation, is an open membership organization made up of people with mental retardation and their families, friends, interested citizens, and professionals in the disability field. With 140,000 members in 1,100 state and local chapters nationwide, The Arc is the largest voluntary organization devoted solely to working on behalf of the estimated seven million people with mental retardation in the United States and their families. The Arc has been intensely involved in pursuing federal legislation which supports the rights of people with mental retardation, including enactment of the ADA and eligibility for Social Security Disability benefits.

The Association of Nurses in AIDS Care is a nonprofit professional nursing organization committed to fostering the individual and collective professional development involved in the delivery of health care to persons infected or affected by HIV and to promoting the health, welfare, and rights of all HIV infected persons.

The Association for Persons in Supported Employment ("APSE") is a rapidly growing national organization formed to improve and expand integrated employment services and outcomes through supported

employment (SE) for persons experiencing disabilities. APSE members are SE professionals, consumers, family members, employers, rehabilitation counselors, advocates, and state and federal agency officials. The outcome of the Cleveland brief will have a dramatic impact on the lives of each of these individuals, most especially those who are supported employees.

The Brain Injury Association, Inc. ("BIA") is the only national non-profit organization dedicated to improving the quality of life of persons with brain injury, as well as promoting research, education and prevention of brain injuries. BIA has 42 state associations and serves persons with brain injury, their families and care givers in all 50 states and territories. BIA represents and advocates with and on behalf of the estimated 2.5 to 6.5 million persons with moderate to severe brain injuries in the United States. Many persons with brain injury are recipients of Social Security Disability Insurance ("SSDI") and/or Supplemental Security Income ("SSI"). As a result of changes in rehabilitation programs, an increasing number of persons with brain injury are gainfully employed. Part of BIA's mission is to assure that all persons with brain injury are afforded the protections of the Americans with Disabilities Act. The disposition of this case will affect the ability of persons with brain injury to have access to and security in employment without losing their entitlement to SSDI and/or SSI.

The Center for Independence of the Disabled in New York ("CIDNY") is one of the network of federally-authorized independent living centers. *See*, 29 U.S.C. §796 *et seq.* Founded in 1979, CIDNY is the oldest such center in New York State. It is organized as a not-for-profit corporation. CIDNY's core mission is to empower people with disabilities to function as independently and effectively as possible. It assists people with disabilities to acquire

independent living skills and to obtain the services they need to live independently in the community. Its missions include "system advocacy," 29 U.S.C. §796. Many of CIDNY's staff and board of directors are people with significant disabilities.

The Center for Women Policy Studies ("CWPS") is a national non-profit, multiethnic and multicultural feminist policy research and advocacy institution founded in 1972. In 1987 the Center founded the National Resource Center on Women and AIDS Policy and has been a leader in addressing critical AIDS policy issues from women's diverse perspectives. The Resource Center has produced more than 30 research, advocacy and policy reports since its inception, including an analysis of the Social Security Administration rules for determining eligibility for HIV-related disability in women. CWPS's Metro DC Collaborative for Women with HIV/AIDS project works directly with low income women living with HIV who will be directly impacted by the ruling in this case.

The Center on Disability and Health is a not-for-profit, Washington, D.C. based research, education and advocacy organization founded in 1994 with a national board of directors representing different sectors of the disability community. A strategic mission of the Center has been using the protected status of persons with disabilities under the Americans with Disabilities Act to challenge discrimination in health care delivery where persons with disabilities are denied an equal opportunity to benefit from covered services. The center supports the amicus brief in *Cleveland v. Policy Management Systems* in order to protect the right of persons with disabilities to challenge discrimination in the workplace when reasonable accommodations are not provided even though they later qualify for Social Security disability benefits.

The Coalition for the Homeless ("Coalition") was founded in 1980 on the principle that decent shelter, sufficient food and affordable housing are fundamental rights in a civilized society. The Coalition educates, advocates for and provides direct services to homeless persons. The Coalition's Scattered Site Housing Program provides apartments, personal support, medical assistance, and vital services to homeless people living with HIV and AIDS.

The Coalition on Human Needs ("Coalition"), founded in 1981, is an alliance of over 170 national organizations working together to promote public policies which address the needs of lower income and other vulnerable populations. The Coalition's members include civil rights, religious, labor, and professional organizations and those concerned with the well-being of children, women, the elderly and people with disabilities. The Coalition also works with grassroots groups across the country that share an interest in the human needs agenda.

The Commission on Rehabilitation Counselor Certification is the national credentialing organization that sets certification standards for Certified Rehabilitation Counselors ("CRCs"). CRCs provide services to individuals with disabilities to facilitate their independence, integration and inclusion in employment and the community.

The Committee For Children is a national advocacy group with an interest in all aspects of child protection, health, education, and fighting the exploitation of children.

Disability Rights Education and Defense Fund, Inc., ("DREDF") is a national disability civil rights law and policy organization dedicated to securing equal citizenship for Americans with disabilities. Since its founding in 1979, DREDF has pursued its mission through education, advocacy

and law reform efforts. Nationally recognized for its expertise in the interpretation of federal disability civil rights laws, DREDF has consistently worked to promote the full integration of citizens with disabilities into the American mainstream, and to ensure that the civil rights of persons with disabilities are protected and advanced.

Disabled in Action of Metropolitan New York, Inc., ("DIA") is a not-for-profit membership organization founded in 1970. Its approximately 400 members are primarily people with disabilities who live or work in New York City. They have a wide range of disabilities. DIA is dedicated to improving the legal, social and economic conditions of people with disabilities, so that they may achieve full integration into society. It works to ensure that people with disabilities receive equal access to employment, health care, public entitlements, education, housing, public accommodations, transportation and other services. It publishes a newsletter and engages in advocacy on a broad range of disability rights issues. It worked to secure passage of §504 of the Rehabilitation Act of 1973, the disability rights provisions of the New York State Human Rights Law, and the Americans with Disabilities Act.

The Employment Law Center (ELC) is a project of the Legal Aid Society of San Francisco, a private, non-profit organization. The primary goal of the ELC is to improve the working lives of disadvantaged people. Since 1970, the Center has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy and national origin. The Center's interest in the legal rights of those with disabilities is longstanding. The ELC has and is representing clients faced with discrimination on the basis of their disabilities, including clients with claims brought under Title II of the Americans with Disabilities Act. The Center has

also filed *amicus* briefs in cases of importance to disabled persons.

The Epilepsy Foundation ("EF") is the sole national, charitable voluntary health organization dedicated to promoting optimal quality of life and independence for the more than two million Americans with a seizure disorder. The Foundation and its network of affiliates work to accomplish this mission through education, research, advocacy and the provision of services. EF has had a long-standing commitment to ensuring that people with epilepsy or seizures are given the opportunity to do so, and conducts both national and state employment programs in order to reach its goal. As part of its commitment to the fullest participation in life and employment possible for people with epilepsy, the Foundation also had put considerable energy into the passage and implementation of laws such as the Americans with Disabilities Act.

The Friends Committee on National Legislation ("FCNL"), since its creation in 1943, has endeavored to bring Quaker values to bear on national policy. Through Congressional testimony, Capitol Hill visits, educational activities, publications, and grassroots lobbying, FCNL works for social and economic justice, peace, and good government. FCNL supports vigorous enforcement of the Americans with Disabilities Act ("ADA") and advocates providing income support to families and individuals, including those who are disabled and those who are unable to meet their basic needs through employment.

The Gay and Lesbian Medical Association ("GLMA") is an organization of lesbian, gay, bisexual and transgendered physicians, medical students, and their supporters. GLMA works to maximize the quality of health and health services for lesbian, gay, bisexual and transgendered people, to

promote full civil rights, and to foster a professional climate in which our diverse members can achieve their full potential. We strive to achieve our goals by: educating health care professionals about our unique health care needs; helping to develop equitable health care policy; promoting relevant research in health; and supporting our members who are challenged by discrimination on the basis of sexual orientation.

The HIV Law Project ("Law Project"), founded in 1989, is a not-for-profit organization which provides legal representation and advocacy to low-income, HIV-positive individuals residing in Manhattan and the Bronx, or who are homeless. During its nine years of operation, the HIV Law Project has directly assisted close to 10,000 HIV-positive individuals, including thousands of low-income, HIV-positive women. We offer free, quality legal assistance and advocacy, primarily in the areas of family law, entitlements, immigration, and housing. In 1997, the Law Project has played a significant role in the development and improvement of local, state, and national public policies affecting HIV-positive women. Through its efforts to ensure that the needs of HIV-positive women and other underserved HIV-positive persons are considered by policy makers, the Law Project has assisted tens and thousands of HIV-positive individuals across the country.

Housing Works is a minority-controlled, community based, nonprofit agency providing housing, health care, advocacy, job training, and vital supportive services to homeless New Yorkers living with HIV and AIDS. Their mission is to reach the most vulnerable and underserved among those affected by the AIDS epidemic: people who, in addition to struggling with homelessness and AIDS, are also burdened with histories of chronic mental illness and chemical dependence. Housing Works has designed a

comprehensive range of services designed to meet the complex, multiple needs of our clients; services intended specifically to help them gain stability, security, and independence so that they can live longer, healthier lives with hope and dignity.

International Association of Psychosocial Rehabilitation ("IAPR") was formed in 1975 to bring together programs and agencies, mental health practitioners, policy makers, families and consumers to strengthen and improve the quality of community based psychosocial rehabilitation services throughout the world. IAPR fosters public policy discussions on mental health, provides education and training for practitioners, families, and consumers, and publishes the Psychiatric Rehabilitation Journal as a forum for research and critical thought.

Justice For All ("JFA") is a not-for-profit entity created in 1994. JFA serves as an advocate for the disability community and is dedicated to protecting, implementing, and strengthening the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and all existing programs and policies that empower people with disabilities. The JFA works in cooperation with other organizations to facilitate the coordination of advocacy and the exchange of information among all national, state and local disability groups.

Lambda Legal Defense and Education Fund, Inc. (Lambda) is a national non-profit public interest legal organization dedicated to the civil rights of lesbians, gay men and people with HIV/AIDS through impact litigation, education and public policy work. Founded in 1973, Lambda is the oldest and largest legal organization addressing these concerns. In 1983, Lambda filed the nation's first AIDS discrimination case. Lambda has appeared as counsel or

amicus curiae in scores of cases in state and federal courts on behalf of people living with HIV or other disabilities, including, in part, *Bragdon v. Abbott,* 107 F.3d 934, *cert. granted* 118 S.Ct. 554 (1997); *Doe & Smith v. Mutual of Omaha Insurance* Company, 1998 WL 166856 (N.D. Ill. April 3, 1998); *School Bd. for Nassau Cty. v. Arline*, 107 S. Ct. 1123 (1987); Chalk *v. U.S. District Court* 814 F.2d 701 (9th Cir. 1988); *McGann v. H&H Music Co.,* 946 F.2d 401 (5th Cir. 1991); and *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (1996). Lambda is particularly familiar with the unique barriers confronting persons with HIV, AIDS and other disabilities who attempt to secure equal employment opportunities.

The Legal Action Center is a nonprofit law and policy organization specializing in AIDS, alcohol and drug issues. The Center's attorneys, who helped draft the ADA protections at stake in Cleveland v. Policy Management Systems, represent individuals with alcoholism, drug dependence and HIV disease and the programs that serve them to resolve discriminatory practices in employment, health care, housing, and zoning.

LLEGÓ, The National Latina/o Lesbian, Gay, Bisexual & Transgender Organization, is committed to organizing and strengthening the Latina/o Lesbian, Gay, Bisexual and Transgender communities at a local, national and international levels by facilitating access to cultural, political and community development resources. One of LLEGÓs goals is to bring to the attention of the local, state and federal governments the glaring disparities in health care and health education between non-minority Americans and Latina/o Americans, and thus, obtain proportionate funding levels.

The Mental Disability Law Clinic of Touro College, Jacob D. Fuchsberg Law Center, is a legal services Protection and Advocacy office established under the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §10805(a)(1)(B), to ensure the protection of the legal rights of individuals labeled mentally ill. It receives federal funding through a contract with the New York State Commission on Quality of Care for the Mentally Disabled.

The National AIDS Fund ("Fund") is the leading business and pioneering philanthropic response to the HIV/AIDS epidemic. Based in Washington, D.C., the Fund represents more than 1,500 companies, foundations, community groups and citizens whose contributions have generated more than $70 million over the past decade to combat the AIDS epidemic in communities across the country. The Fund is marking its 10th anniversary in 1998. The Fund provides national grants to 32 "Community Partners" in 25 states. Partners match the grants with their own fundraising and make grants to community organizations that provide prevention, education, care and services. In 1997, the Fund and its Partners awarded grants totaling over $10 million to more than 450 community groups. The Fund is also a strategic resource for key information and services on HIV/AIDS, and a pioneer in stimulating positive, practical responses from business and labor, both domestically and globally.

The National Association of People with AIDS ("NAPWA"), founded in 1983, advocates on behalf of all people living with HIV and AIDS in order to end the pandemic and the human suffering caused by HIV/AIDS.

The National Association of Protection and Advocacy Systems ("NAPAS"), which was founded in 1981, is a membership organization for the nationwide system of

protection and advocacy ("P&A") agencies. P&As are mandated under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq*., the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. 10801 *et seq*., and the Protection and Advocacy for Individual Rights Program, 29 U.S.C. 794e, to provide legal representation and related advocacy services on behalf of all persons with disabilities. In fiscal year 1996, P&As served over 1,000,000 people with disabilities through a variety of mechanisms: individual case representation, systemic advocacy, information and referral and education efforts. NAPAS facilitates the coordination of P&A activities, provides P&As with training and technical assistance and represents their interests before the Executive and Legislative Branches of government.

The National Association of Orthopedic Nurses ("NAON") has 8,000 members in the United States. NAON's members treat individuals suffering from musculoskeletal illnesses, including arthritis. Arthritis is the leading cause of disability in the United States.

The National Council for Community Behavioral Health care ("NCCBH") is the nation's oldest and largest trade association representing direct care providers, state associations, county authorities, integrated delivery systems, and associations. Founded in 1970, NCCBH is dedicated to the pursuit of accessible, effective, and cost-effective behavioral health care services for all Americans.

The National Council of Jewish Women ("NCJW"), Inc. is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1983, the

NCJW has 90,000 members in over 500 communities nationwide. Given NCJW's historical commitment to civil rights issues and active involvement in passage of the Americans with Disabilities Act, we join this brief.

The National Health Law Program ("NHeLP") is a national public Interest firm that seeks to improve health care for America's working and unemployed poor, minorities, elderly and people with disabilities. NHeLP serves legal services programs, protection and advocacy offices, community-based organizations, the private bar, providers, and individuals who work to maintain a health care safety net for the millions of uninsured or underinsured low income people. NHeLP monitors Medicare, Medicaid and other publicly-funded health care programs, seeks remedies when laws and policies are ignored, and helps Americans receive needed medical care.

The National Minority AIDS Council ("NMAC"), established in 1987 is the premier national organization dedicated to developing leadership within communities of color to address the challenge of HIV/AIDS. MAC's Public Policy Division works to promote sound national HIV/AIDS health and social policies which are responsive to the needs of the diverse communities of color impacted by HIV/AIDS and to increase the participation of people of color in policy-making bodies.

The National Native American AIDS Prevention Center's ("NNAAPC") mission is to prevent the spread of HIV and related diseases in American Indian, Alaska Native, and Native Hawaiian communities, and to improve the quality of life of those in our communities infected and affected by HIV. NNAAPC provides technical assistance, training, case management services, research and policy advocacy to and for Native Americans throughout the United States.

The National Partnership for Women & Families (National Partnership) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance equal employment opportunities by monitoring agencies' EEO enforcement, challenging employment discrimination in the courts, and leading efforts to promote employment policies such as the Family and Medical Leave Act and The Pregnancy Discrimination Act.

The National Senior Citizens Law Center ("NSCLC") advocates nationwide to promote the independence and well-being of low-income elderly individuals, as well as persons with disabilities, with particular emphasis on women and racial and ethnic minorities. Much of NSCLC's work focuses on federal benefit programs, including Social Security and Supplemental Security Income. To achieve its goals, NSCLC engages in various advocacy efforts, including litigation, policy analysis, and administrative and legislative advocacy. Established in 1972, NSCLC maintains offices in Washington, DC, and Los Angeles, CA.

NETWORK, a national Catholic social justice lobby, works for federal legislation that favors the poor and powerless and promotes world peace and global justice. NETWORK lobbies and organizes for socially just legislation including securing just access to economic resources, reordering federal budget priorities, and obtaining global economic justice. NETWORK educates on NETWORK's legislative issues and the political process for structural changes.

New York Lawyers for the Public Interest, Inc., ("NYLPI") is a non-profit public interest law office founded in 1977 which practices disability, health and environmental justice law. Under contracts with the New York State Commission on Quality of Care for the Mentally Disabled, it operates four federally-authorized Protection and Advocacy programs in New York City, and serves people with all types of disabilities in a wide variety of issues. *See* 29 U.S.C. §732; 42 U.S.C. §§6041 *et seq.*; 42 U.S.C. §§10801 *et seq*; and 29 U.S.C. §794e. NYLPI handles a broad array of matters involving the Americans with Disabilities Act and similar laws.

NISH (formerly National Industries for the Severely Handicapped) maximizes employment opportunities for people with severe disabilities through providing professional and technical assistance to not-for-profit community rehabilitation programs (CRPs) to encourage and assist their participation in the Javits-Wagner-O'Day (JWOD) Program and other employment or training activities as appropriate. NISH is the central nonprofit agency designated by the Committee for Purchase from People who are Blind or Severely Disabled to provide assistance to CRPs interested in obtaining federal contracts under the JWOD Program. It is one of NISH's goals to expand employment, personal advancement and placement of people with disabilities by maximizing opportunities created by the JWOD program while taking advantage of other employment opportunities. The civil rights of people with severe disabilities are of utmost priority to NISH primarily for the protection of employment rights. However, NISH also supports the protection of civil rights for people with disabilities in all areas to promote independent living and greatest opportunities for an integrated life with the rest of society.

Parents, Families and Friends of Lesbians and Gays ("PFLAG") was created in 1972 to promote the health and well-being of gay, lesbian, bisexual and transgendered persons, their families and friends through support, to cope with an adverse society; education, to enlighten an ill-informed society; and advocacy, to end discrimination and to secure equal civil rights. PFLAG also provides opportunity for dialogue about sexual orientation and gender identity, and acts to create a society that is healthy and respectful of human diversity. Today, PFLAG's membership includes more than 70,000 households in 400-plus communities in the U.S. and Puerto Rico and in 11 other countries.

RESNA is the Rehabilitation Engineering and Assistive Technology Society of North America. RESNA is an interdisciplinary association whose purpose is to improve the potential of people with disabilities to achieve their goals through the use of technology. The association serves that purpose by promoting research, development, education, advocacy and the provision of technology and by supporting the people engaged in these activities. RESNA's members are dedicated to promoting the exchange of ideas and information for the advancement of assistive technology. RESNA seeks to participate as amicus curiae in this case because it believes that the Plaintiff's rights to seek remedies under the ADA, including reasonable accommodations which may include technologies, should not be impinged because she received or applied for Social Security Disability Insurance.

Founded in 1983, the San Francisco AIDS Foundation is a non-profit community based AIDS service organization that has been at the forefront of the battle against HIV disease for fifteen years. The San Francisco AIDS Foundation is the largest community-based service organization in Northern

California providing an array of direct services to people living with HIV/AIDS and at risk of HIV infection.

The Title II Community AIDS National Network, Inc. ("T-II CANN") is incorporated as a not-for-profit corporation and represents the interests of service providers and their clients who receive services funded under Title II of the Ryan White CARE Act. T-II CANN provides technical assistance, information, communications, publications and advocacy training in issues ranging from the AIDS Drug Assistance Program, Medicaid, Medicare, AIDS related health insurance, and benefits. T-II CANN supports finding a cure for HIV/AIDS and ensuring that access to that cure is available for all people living with HIV/AIDS. Until a cure is discovered, T-II CANN will advocate for effective treatments for HIV/AIDS and universal access to those treatments for all people living with HIV/AIDS.

The Union of American Hebrew Congregations ("UAHC") is the synagogue arm of the Reform Jewish movement, representing some 850 congregations and 1.5 million members nationwide. For over a century, the UAHC has fought passionately for religious liberty and tolerance for all Americans, believing these to be among the greatest gifts America has bestowed upon its citizens of the world. The UAHC played an active role in securing the passage of the ADA.

The YWCA of the U.S.A. is the oldest national women's membership organization in the nation. Its mission is to empower women and to eliminate racism. Founded in 1958, it currently serves over two million women and girls and their families through 340 YWCAs operating in 4,000 locations in all 50 states. Strengthened by diversity, the Association draws together members who strive to create opportunities for women's growth, leadership and power in

order to attain a common vision: peace, justice, freedom and dignity for all people. YWCA supports the position taken in this amicus curiae brief because of (1) their commitment to confronting racism and bias at all levels in society and (2) a public policy priority adopted at the YWCA's 1998 convention: health care policies that promote wellness and provide access to quality affordable health care for all women and girls.

(8)

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IN THE
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OCTOBER TERM, 1998

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v.

POLICY MANAGEMENT SYSTEMS CORP., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*?

2. If it does not create such a presumption, what weight, if any, should be given to the application for, and receipt of, disability insurance benefits when a person asserts that she is a "qualified individual with a disability" under the ADA?

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief as *amicus curiae* with the written consent of all parties.[1] The brief urges the Court to affirm the decision of the court of appeals.

INTEREST OF THE *AMICUS CURIAE*

EEAC is an asociation of employers formed in 1976 to promote sound programs to end employment discrimination. Its members include more than 300 of the nation's largest private employers. Its directors and officers include many of industry's leading experts on equal opportunity and affirmative action. Their combined experience gives EEAC valuable insight into the practical and

[1] Counsel for *amicus Curiae* EEAC authored this brief in its entirety. No person or entity other than the EEAC made a monetary contribution to the preparation of the brief.

legal implications of equal employment opportunity requirements and practices.

EEAC's members all are employers subject to the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA), as well as other equal employment statutes. In addition, all EEAC member companies are subject to the Social Security payroll tax imposed by 26 U.S.C. § 3111, and provide or subsidize generous benefit packages for their workers that include some combination of health insurance, long-term disability insurance, short-term disability insurance, paid vacation and paid sick leave. Moreover, many, if not all, EEAC members also are subject to state disability insurance taxes and workers' compensation requirements. As a result, EEAC members are especially concerned about the issue presented in this case —whether employees will be permitted to claim simultaneously that they are "totally disabled" for the purposes of receiving disability benefits, yet "qualified" for work for the purposes of suing the company under the ADA.

EEAC thus has an interest in, and familiarity with, the issues and policy concerns presented to the Court in this case. As a result, EEAC is well situated to brief the Court on implications beyond the immediate concerns of the parties.

STATEMENT OF THE CASE

The facts of the case are set out fully in the brief for Respondent. A summary of the facts is set out below.

Petitioner Carolyn Cleveland (Cleveland) began working for Respondent Policy Management Systems Corp. (PMSC) in August 1993. In January 1994, Cleveland had a stroke and took a leave of absence from the company. That same month, Cleveland filed for Social Security disability benefits (SSA benefits), representing that she was "unable to work because of [her] disabling condition." In April 1994, Cleveland returned to work part-time for PMSC but did not withdraw her claim for disability benefits. On July 11, SSA denied Cleveland's request for benefits. On July 15, Cleveland was terminated by PMSC for poor performance.

In September 1994, Cleveland filed a request for reconsideration of her SSA benefit determination stating that she "disagree[d] with the determination made on [her] disability," that she "continue[d] to be disabled," that she "worked 3 months or less and stopped because of [her] injury or illness," and that she "could no longer do the job because of [her] condition." In support of her position, Cleveland's neurologist stated that she had a "complete disability" and was "100% disabled." Cleveland continued to maintain this position through September 1995, at which time she was granted SSA benefits. That same month, Cleveland sued PMSC alleging unlawful termination under the ADA.

The district court dismissed Cleveland's claim, concluding, based on her own sworn assertions, that she could not perform the essential function of her job. The U.S. Court of Appeals for the Fifth Circuit affirmed the district court's ruling, holding that Cleveland's prior application for, and receipt of, disability benefits presumptively estopped her from claiming that she was qualified for her job under the ADA. The court of appeals further concluded that Cleveland could not overcome this presumption of judicial estoppel after carefully considering her specific, unqualified assertions of total disability in pursuit of those benefits.

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that Cleveland's prior and contemporaneous representations of disability in connection with her application for SSA benefits judicially estopped her from asserting that she was "qualified" for the purposes of the ADA.

Judicial estoppel is a just and important doctrine that is necessary in preserving the integrity of the courts. The doctrine prevents a party from recovering, twice, on two different versions of the "truth" that cannot co-exist. "The

principle is that if you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events." *Astor Chauffered Limosine v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1547 (7th Cir. 1990).

Today, the viability of equitable doctrines such as judicial estoppel is more important than ever. In recent years, filings in the federal courts—especially employment-related filings—have increased dramatically. Not surprisingly, the filing of meritless lawsuits against companies has increased as well—at least proportionally. In light of these factors, permitting claimants to swear to any convenient and inconsistent set of facts in multiple proceedings in the hope that some, or all, claims might "stick"—the approach urged by Petitioner and her *amici*—is poor judicial policy that should rejected by this Court.

As the court of appeals recognized, that a plaintiff brings one of her inconsistent claims under the ADA does not render judicial estoppel inappropriate. Although such claims otherwise might serve the public interest as well as the private interests of the plaintiff, the public interest can never be served by an abuse of the judicial process. The majority of district courts—those bodies especially sensitive to the truth-finding role of the courts—have recognized the systemic danger posed by allowing double recovery based on inconsistent positions—even where one of the claims is brought under the ADA.

Accordingly, this Court should recognize the doctrine of judicial estoppel and apply it to appropriate cases under the ADA. Where ADA plaintiffs previously or contemporaneously have applied for, and received, SSA benefits, such plaintiffs should be estopped from proceeding under the ADA *to the extent that their applications are inconsistent with their claims under the ADA*. Highly specific factual representations made in connection with SSA benefit applications should bar contrary factual assertions under the ADA. Moreover, as the court of appeals properly concluded here, general and unqualified assertions of

complete disability should presumptively estop a plaintiff from establishing that she is "qualified" under the ADA—a presumption that can, in some cases, be rebutted by the particular facts of the case.

In any event, whether or not doctrine of judicial estoppel applies in such cases, a plaintiff's prior factual assertions in pursuit of SSA benefits should be given great weight at summary judgment. Prior, specific factual assertions should be given controlling weight, absent the most unusual circumstances, while general, unqualified assertions of disability should create a strong evidentiary presumption that the plaintiff is not qualified for the purposes of the ADA.

ARGUMENT

I. JUDICIAL ESTOPPEL IS A JUST AND IMPORTANT EQUITABLE DOCTRINE THAT SHOULD APPLY TO CLAIMS UNDER THE ADA

A. Judicial Estoppel Is a Just Doctrine That Is Necessary in Preserving the Integrity of the Judicial System

Judicial estoppel is a just and important equitable doctrine that should be recognized by this Court. Judicial estoppel, also known as the doctrine of preclusion of inconsistent positions, bars a party from asserting a factual position in a legal proceeding that is contrary to a position taken by that party in a prior proceeding.

Although this Court has never specifically addressed the question, the overwhelming majority of courts of appeals —namely the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh and Federal Circuits—have recognized the doctrine. *See, e.g., Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208 (1st Cir. 1987); *Bates v. Long Island R.R.*, 997 F.2d 1028 (2d Cir.), *cert. denied*, 510 U.S. 992 (1993); *Scarano v. Central R.R. Co.*, 203 F.2d 510 (3d Cir. 1953); *Lowery v. Stovall*, 92 F.3d 219 (4th Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997); *Ergo Science v. Martin*, 73 F.3d 595 (5th Cir. 1996); *Smith v. Montgomery Ward & Co.*, 388

F.2d 291 (6th Cir.), *cert. denied*, 393 U.S. 871 (1968); *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420 (7th Cir. 1993); *Wyldes v. Hundley*, 69 F.3d 247, 251 n.5 (8th Cir. 1995), *cert. denied*, 517 U.S. 1117 (1996); *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996); *American Nat'l Bank v. FDIC*, 710 F.2d 1528 (11th Cir. 1983); *Data Gen. Corp. v. Johnson*, 78 F.3d 1556 (Fed. Cir. 1996).

As the Second Circuit has explained, the doctrine is necessary because it "protects the sanctity of the oath and the integrity of the judicial process." *Bates*, 997 F.2d at 1038. Judicial estoppel prevents a party from making a "mockery of [the] justice system" by recovering on two versions of the same facts that cannot co-exist. *American Nat'l Bank*, 710 F.2d at 1536. As the Seventh Circuit succinctly explains, "the principle is that if you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events." *Astor Chauffered Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1547 (7th Cir. 1990). Judicial estoppel is a just and prudent doctrine that prevents parties from playing "fast and loose" with the courts, *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993), *cert. denied*, 511 U.S. 1042 (1994), and "gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Rissetto*, 94 F.3d at 600.

Although this Court has never directly ruled on judicial estoppel, the Court recognized more than a century ago the fundamental wisdom of the policy.

> It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken.

Davis v. Wakelee, 156 U.S. 680, 689 (1895). Thus, judicial estoppel is well-grounded in the traditional equitable concepts of fairness, judicial integrity, and justice, and should be recognized by this Court.

There are also practical reasons why judicial estoppel should remain a viable principle in the federal courts. In recent years, cases filed in the federal courts have increased dramatically. During this decade, total annual filings in the federal courts have increased by more than 60,000 cases.[2] Employment-related filings—such as the complaint at issue here—have risen even more dramatically, from 8,297 in 1990 to 24,174 in 1997—a 190% increase.[3] Moreover, the public perceives, and statistics bear out, that many if not most of these claims are entirely without merit. 22 *Mental and Physical Disabilities Law Reporter* 403 (1998) (ABA study of over 1200 ADA cases indicated that 92 percent of the claims ultimately were determined to be without merit.)[4]

Statistics with respect to the federal agencies are no better. According to the Social Security Administration,

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[2] Statistics from the Administrative Office of the United States Courts indicate that 273,212 cases were filed in the district courts in 1997 compared with 211,748 in 1990. Administrative Office of the United States Courts, Table C-2A, U.S. District Courts, Civil Cases Commenced (1990, 1997).

[3] Administrative Office of the United States Courts, Table C-2A, U.S. District Courts, Civil Cases Commenced (1990, 1997).

[4] The courts also have begun to take note of the propensity of meritless employment claims.

> This Court has observed too many cases where an individual who has been rejected for a job or who has been fired from a position will make totally unsupported claims of discrimination. Indeed, some persons make multiple, non-substantiated claims, i.e., race, religion, gender, age, in the same case in the hope that maybe one of the claims will "stick."

Bray v. Georgetown Univ., 917 F. Supp. 55, 60 (D.D.C. 1996), *aff'd without op.*, 116 F.3d 941 (D.C. Cir. 1997).

> This case is just another entrant in a tiresome parade of meritless discrimination cases. Again and again, the Court's resources are sapped by such matters, instigated by implacable parties and prosecuted with questionable judgment by their counsel. It is high time for this to stop.

Keegan v. Dalton, 899 F. Supp. 1503, 1515 (E.D. Va. 1995).

that agency receives approximately 2 million claims for disability benefits annually, one-half of which are fully denied.[5] As the Commission on the Future Worker-Management Relations (Dunlop Commission) observed:

> court litigation has become a less-than-ideal method of resolving employees' public law claims. As spelled out in the Fact-Finding Report, employees bringing public law claims in court must endure long waiting periods as governing agencies and the overburdened court system struggle to find time to properly investigate and hear the complaint.

Dunlop Commission, Report and Recommendations 3 (1994). The ever-increasing litigious nature of our society has led one member of this Court to exclaim with exasperation that "people's patience with the judicial system is wearing thin." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 752 (1981) (Burger, C.J., dissenting).

In light of these statistics, permitting claimants to swear to any convenient and inconsistent set of facts in multiple proceedings in the hope that some or all claims will "stick"—the approach urged by Petitioner and her *amici*—is poor judicial policy that this Court should reject.

Only the Tenth Circuit has explicitly rejected the doctrine of judicial estoppel, and the reasoning of that court is less than persuasive. *See Parkinson v. California Co.*, 233 F.2d 432, 437-38 (10th Cir. 1956).[6] First, that court relied on the erroneous proposition that judicial estoppel had not been accepted by a majority of courts.

[5] Source: Social Security Administration Office of the Chief Actuary.

[6] The D.C. Circuit also has indicated hostility toward the doctrine but that court's approach has not been conclusive. *Southern Pac. Transp. Co. v. ICC*, 69 F.3d 583, 591 n.3 (D.C. Cir. 1995) (dicta indicating that judicial estoppel is disfavored by that court); *Swanks v. Washington Metro Area Transit Auth.*, 116 F.3d 582, 587 (D.C. Cir. 1997) (dicta indicating that plaintiff who had made prior, specific factual assertions "could well be barred" from maintaining a subsequent inconsistent position).

Parkinson, 233 F.2d at 438. In truth, however, the doctrine has been accepted by the overwhelming majority of state and federal courts.[7]

Moreover, the Tenth Circuit's principal objections to judicial estoppel—which are embraced by *amici* National Employment Lawyers Association (NELA) and the Association of Trial Lawyers of America (ATLA)—are fundamentally flawed. According to that court, judicial estoppel is inconsistent with the judiciary's truth-finding function and contemporary alternative pleading rules. *Parkinson*, 233 F.2d at 438. Both of these concerns are illusory, however, in light of one of the doctrine's principal considerations—success in the prior legal proceeding.[8]

With the prior success factor, judicial estoppel in no way can be construed as inconsistent with the judiciary's truth-finding function. When a court applies judicial estoppel, it does not cease to look for the truth, but rather, *accepts as true* the claimant's prior, *successful* version of the facts and bars recovery based on her subsequent, and

[7] As noted above, eleven of the thirteen federal circuits have accepted and applied the doctrine in appropriate cases. A survey of the states reveal that at least thirty-one jurisdictions have recognized the principle, while only six states have rejected the doctrine. Douglas W. Henkin, *Judicial Estoppel-Beating Shields Into Swords and Back Again*, 139 U. Pa. L. Rev. 1711, 1756-1760 (1991).

[8] The majority of federal courts that have adopted judicial estoppel consider the extent of the claimant's success in the prior proceeding as an important, if not necessary, factor in the application of the doctrine. *See Bates*, 997 F.2d at 1038; *Lowery*, 92 F.3d at 224; *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758, 761 (5th Cir. 1994); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982); *Astor Chauffered Limousine Co.*, 910 F.2d at 1548. Apparently only the Third Circuit has applied the doctrine in the absence of prior success. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 361 (3d Cir. 1996). The Henkin survey of state courts likewise indicates that 17 of the 18 jurisdiction that have addressed the question have adopted the prior success consideration. *Henkin*, *supra* note 7 at 1756-1760. In any event, the Court need not resolve this question here as Petitioner clearly was successful in obtaining the benefits she desired based on her prior assertions of disability.

contrary version of the "truth." In fact, it is the Tenth Circuit's approach—which permits a claimant to *successfully* swear, under oath, to two different sets of facts that cannot co-exist—that makes a mockery of the court's truth-finding function. Under such circumstances, *no truth* can be found—and no factual issues can be resolved—but rather, the claimant simply is allowed to recover *regardless* of the truth. As the Seventh Circuit explains, "the [claimant's] offense is not so much taking inconsistent positions so much as it is winning, twice, on the basis of incompatible positions." *Astor Chauffered Limousine Co.*, 910 F.2d at 1548. Thus, rather than impeding the court's truth-finding role, the doctrine is necessary in preserving that role.

The prior success factor also renders the alternative pleading concern meritless. Federal Rule of Civil Procedure 8(e)(2) permits a party to plead facially inconsistent positions in the same proceeding. This rule is part of the federal courts' liberal pleading process, which is designed to allow parties to *plead* potentially inconsistent factual and legal theories so that such theories are not foreclosed *prior to discovery*. This liberal pleading system, however, does not permit, let alone contemplate, the possibility that a plaintiff may *recover* on two contradictory factual assertions. On the contrary, it is well-settled that inconsistent factual findings may not be sustained. *See, e.g.*, Fed. R. Civ. P. 49(b); *Rosado v. Deters*, 5 F.3d 119, 124-25 (5th Cir. 1993); *Waggoner v. Mosti*, 792 F.2d 595, 596-97 (6th Cir. 1986).

In short, in light of the consideration of success in the prior proceeding, the Tenth Circuit's concerns that judicial estoppel runs afoul of the court's truth-finding function and the liberal federal pleading rules are without merit.[9]

[9] It is important to note that the Tenth Circuit's *Parkinson* decision—the principal authority against the application of estoppel—did not address the doctrine in light of the prior success factor. In that case, the defendant sought to estop the plaintiff's claim based on inconsistent pleadings submitted in a state court action that apparently was still pending. *Parkinson*, 233 F.2d at 435-38. The limited holding of the case is that the plaintiff should not be estopped based on those pleadings. *Id.* at 438. Indeed, in making that ruling, the *Parkinson* court cited with approval the Wyoming rule which would impose estoppel where the claimant's prior position had been successful. *Id.* at 438. Thus, the Tenth Circuit's reasoning, which might carry some force against estoppel without prior success, really has little relevance here, where the Petitioner's prior position was successful.

In their brief supporting Petitioner, *amici* NELA and ATLA proffer several other arguments against the application of judicial estoppel, all of which are unpersuasive. First, they contend that the application of judicial estoppel requires courts to make credibility determinations in violation of Fed. R. Civ. P. 56 and this Court's ruling in *Anderson Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

This argument is disingenuous, because credibility, if addressed at all in judicial estoppel, is resolved in favor of the plaintiff. As explained above, the court merely *accepts as true* the facts as *successfully sworn to* by the plaintiff in the prior proceeding, and prevents an abuse of the courts by barring an additional recovery based on contrary assertion. In this way, judicial estoppel is consistent with rule 56 summary judgment and *Liberty Lobby*, in that it merely disposes of cases that do not present a triable controversy.[10]

NELA and ATLA also assert that judicial estoppel prevents a plaintiff from demonstrating that its prior and subsequent positions are not actually inconsistent, in that courts will look only to facial inconsistencies. This, however, is a patent misinterpretation of existing law. *See General Signal Corp. v. MCI Telecomms. Corp.*, 66 F.3d

[10] For this same reason, the assertion by NELA and ATLA that judicial estoppel violates the Seventh Amendment by depriving a claimant of the right to a jury trial, likewise is without merit. Like rule 56 summary judgment or directed verdict, judicial estoppel does not offend the Seventh Amendment because it merely disposes of cases that present no triable controversy. *Galloway v. United States*, 319 U.S. 372, 389-90 (1943).

1500, 1505 (9th Cir. 1995) (mere "threshold" inconsistency is not sufficient for judicial estoppel), *cert. denied*, 516 U.S. 1146 (1996). Indeed, because inconsistency of positions is the essence of judicial estoppel, the doctrine mandates an in-depth analysis of the consistency of the factual assertions. *See Simon v. Safelite Glass Corp.*, 128 F.3d 68, 72-73 (2d Cir. 1997) ("there must be a true inconsistency between the statements in the two proceedings").

Thus, judicial estoppel is a just and necessary doctrine that should be recognized by this Court.[11]

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[11] NELA and ATLA also devote a significant portion of their brief to what they term judicial estoppel's history of "conflict and confusion." While there are some divisions among the circuits in this area, NELA and ATLA demonstrate a fundamental lack of understanding of the issue. Like any equitable doctrine, the application of judicial estoppel in any given case must be decided based on all the relevant facts and circumstances of that case. *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 617 (3d Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997). As a result, "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982). NELA and ATLA misconceive the nature of equity when they assert that there are no uniform rules for applying judicial estoppel. Unlike law, equity deals in the weighing of *factors*, not in the satisfaction of *elements*. Consequently, circumstances such as the type and extent of the claimant's prior success, honest mistake, the extent of any reliance by, or prejudice to, the defendant, the intent of the plaintiff (*i.e.* bad faith), and the context in which the prior assertion was made, all are relevant *factors* in the inquiry—but none are prerequisite. For example, success in the prior proceeding may be a highly significant factor in the balance, but where the claimant clearly is misusing the judicial process or otherwise is acting in bad faith, prior success may not be an absolute prerequisite. *See, e.g.*, 18 Moore's Federal Practice § 134.33[4] ("Most of the cases can be read as saying that judicial estoppel is most appropriate when the party succeeded in the prior proceeding, but not as establishing prior success on the issue as an absolute prerequisite for judicial estoppel.")

B. Judicial Estoppel Should Apply to Claims Under the ADA

The doctrine of judicial estoppel should apply to claims that are brought under the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* Resolution of this question requires that the Court address two separate questions: whether the courts have the power under the ADA to invoke judicial estoppel; and whether judicial estoppel is appropriately exercised in cases arising under the ADA.

It is clear that the courts have the power to invoke the doctrine of judicial estoppel under the ADA. It is well-settled that absent a clear legislative command to the contrary, courts possess their full equitable powers with respect to claims arising under a federal statute.

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of [the court's equitable] jurisdiction.
>
> . . . .
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (citations omitted). *See also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Quite simply, the ADA does not place any limitations, clear or otherwise, on the courts' equitable powers. *See generally* 42 U.S.C. § 12101 *et seq.* On the contrary, the statute reaffirms that a court may award "any" equitable relief that the court deems appropriate. *See* 42 U.S.C. § 12117(a) (incorporating by reference the enforcement provisions of 42 U.S.C. § 2000e-5(g)). Thus, the only issue is whether judicial estoppel appropriately can be applied to cases

arising under the ADA—a question that also must be answered in the affirmative.

As demonstrated *supra*, section I.A, the doctrine of judicial estoppel is necessary in preserving the integrity of the judicial process. Permitting claimants to recover, twice, on two versions of the "truth" that cannot co-exist clearly is repugnant to any sense of justice. That a claimant may have presented one of her claims under the ADA does not alter the proper focus of this issue—that it is fundamentally *wrong* to permit an individual to recover, twice, on two sets of facts that cannot co-exist.

The majority of district courts that have addressed this question under the ADA have recognized the impropriety of allowing such "double dipping."

> To allow [the plaintiff] to assert that he was able to perform the duties of his employment with Marathon at the same time he collected disability benefits, awarded as a result of his representations that he could no longer work, would countenance a fraud either on this court or on the federal agency that awarded him those benefits.

Harris v. Marathon Oil Co., 948 F. Supp. 27, 29 (W.D. Tex. 1996), *aff'd without op.*, 108 F.3d 332 (5th Cir. 1997).

> [H]ere plaintiff effectively seeks to disavow his prior representations and to claim that he has a lesser disability meeting the ADA standards. Such gamesmanship and blatant inconsistency cannot serve as a basis to defeat summary judgment.

Bonnano v. Gannett Co., 934 F. Supp. 113, 115 (S.D.N.Y. 1996).

> Plaintiff . . . cannot speak out of both sides of her mouth with equal vigor and credibility before this court. Plaintiff now seeks money damages from [the employer] on her assertion that she was physically willing and able to work during the same time that she was regularly collecting disability payments based on her assertions that she was physically unable to work.

Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963, 970 (E.D.N.C. 1994).

> [T]he plaintiff in this case may be precluded, independent of any estoppel doctrine, from arguing "whatever state of facts seems advantageous at a point in time, and a contradictory state whenever self-interest may dictate a change."

Smith v. Midland Brake, 911 F. Supp. 1351, 1357 (D. Kan. 1995) (citations omitted), *aff'd*, 138 F.3d 1304 (10th Cir.), *vacated, reh'g en banc granted* 158 F.3d 1060 (10th Cir. 1998).

> The Court finds that plaintiff's present assertion that she could perform the essential activities of her job . . . is completely belied by her admission [to the contrary on her Social Security documents]
>
> . . . .
>
> [T]he Court finds that the plaintiff is guilty of doing what plaintiffs in the cases discussed above did—*i.e.* speaking out of both sides of the mouth.

Kennedy v. Applause, 1994 U.S. Dist. LEXIS 19216, at *15-16 (C.D. Cal. Dec. 6, 1994), *aff'd*, 90 F.3d 1477 (9th Cir. 1996).

Obviously, the views of the district courts are not binding on this Court. Nevertheless, it is important to note that the truth-finding (*i.e.* fact-finding) power and responsibility of the federal judicial branch is vested in those courts. Consequently, their experience in such matters clearly gives them the fullest appreciation of the systemic danger posed by permitting claimants to recover on multiple and contrary versions of the "truth"—even under the ADA. As one such court described the matter: "Regardless of what label attache[s] to this phenomenon . . . [it] is not legally proper." *Pegues v. Emerson Elec. Co.*, 913 F. Supp. 976, 981 (N.D. Miss. 1996). Thus, the majority of the district courts correctly have recog-

nized the propriety of the doctrine of judicial estoppel in claims under the ADA.

Amici NELA and ATLA, as well as *amicus* United States, mistakenly rely on this Court's decision in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), to support a contrary result. *Amici* contend that *McKennon* stands for the broad proposition that equitable preclusionary doctrines never are appropriate in civil rights cases, because such cases serve a public interest in addition to the interests of the individual. This position, however, is based on a misreading of *McKennon*, and a misconception of equity.

McKennon involved a lawsuit under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* In the course of discovery in that case, the employer learned that the plaintiff engaged in misconduct while employed which, if previously known, independently would have justified her discharge. The employer sought to bar the plaintiff's suit based on the equitable doctrine of "unclean hands." This Court concluded, however, that it was inappropriate to apply that doctrine to bar the plaintiff's ADEA claim completely, because such claims serve the important public interest of deterring unlawful discrimination in addition to the plaintiff's private interest in obtaining relief. *McKennon*, 513 U.S. at 360. The Court did explain, however, that the doctrine generally would bar the private claim for front-pay, reinstatement, and an appropriate portion of backpay. *Id.*

McKennon, therefore, simply reaffirms the paradigmatic approach to equity—that equitable doctrines (preclusionary or otherwise) are applied to the extent that they are just and equitable. The preclusionary doctrine of "unclean hands" serves no public interest. It merely prevents one party from obtaining relief from another where that party, itself, has acted reprehensibly during the transaction in question. *See id.* Thus, while it applies to civil rights cases, its scope in those cases properly is

limited to the plaintiff's relief, and it cannot bar the public nature of the claim.

This limitation, however, is not present with respect to judicial estoppel. That doctrine serves the important *public* interests of preserving the integrity of the judicial system and preventing misuse of the courts. As this Court has noted, where "the public interest is involved . . . equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter*, 328 U.S. at 398. Consquently, where properly invoked, judicial estoppel bars claims *regardless* of whether they otherwise would serve the public interest —precisely because abuse of the judicial process can never serve the public interest.

For the foregoing reasons, the doctrine of judicial estoppel should be recognized by this Court and it should be applied, where appropriate, to claims under the ADA.

II. JUDICIAL ESTOPPEL SHOULD APPLY WHERE THE PLAINTIFF'S APPLICATION FOR SOCIAL SECURITY BENEFITS IS INCONSISTENT WITH HER CLAIM UNDER THE ADA

Judicial estoppel should apply where a plaintiff's previous application for SSA benefits cannot be reconciled with her claim under the ADA.

The ADA prohibits discrimination in employment against a "qualified individual with a disability." 42 U.S.C. § 12112(a). "Under the ADA, only [those] who are 'qualified' for the job in question may state a claim for discrimination." *Tyndall National Educ. Ctrs.*, 31 F.3d 209, 212 (4th Cir. 1994).

A qualified individual with a disability is defined by the statute as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Consistent with the plain language of the Act, courts

uniformly have held that plaintiffs must prove that they are able, with or without reasonable accommodation, to perform the essential functions of the job in question. *Budd v. ADT Sec. Sys.*, 103 F.3d 699, 700 (8th Cir. 1996); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996); *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995); *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Where ADA plaintiffs previously have applied for, and received, SSA benefits, such plaintiffs should be estopped from proceeding under the ADA *to the extent that their applications are inconsistent with their claims under the ADA*.

A. Judicial Estoppel Should Apply to Sworn Assertions Made in Prior Administrative Proceedings

The doctrine of judicial estoppel should apply to assertions made in prior administrative, as well as judicial, proceedings. The courts of appeals that have confronted this issue, namely the Second, Third, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits, all have applied the doctrine to representations made in the administrative context. *See, e.g., Simon v. Safelite Glass Corp.*, 128 F.3d at 72 (applying judicial estoppel to statements made in the SSA benefit context); *McNemar*, 91 F.3d at 618 (same), *cert. denied*, 519 U.S. 1115 (1997); *Cleveland v. Policy Mgmt. Sys. Corp.*, 120 F.3d 513, 514 (5th Cir. 1997) (same); *Talavera v. School Bd.*, 129 F.3d 1214, 1220 (11th Cir. 1997) ("we do hold that an ADA plaintiff is estopped from denying the truth of any statement made in her [social security] disability application."); *Smith v. Montgomery Ward & Co.*, 388 F.2d 291, 292 (6th Cir. 1968) (applying the doctrine to statements made in workers' compensation context); *Rissetto v. Plumbers & Steamfitters Local* 343, 94 F.3d 597, 604 (9th Cir. 1996) (same); *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 191 (7th Cir. 1995) (applying the doctrine to statements made in a police pension board hearing).

As the Ninth Circuit explains:

> Unsurprisingly, given its name, judicial estoppel is often articulated as applying to judicial proceedings. However, many cases have applied the doctrine where the prior statement was made in an administrative proceeding, and we are not aware of any case refusing to apply the doctrine because the prior proceeding was administrative rather than judicial.

Rissetto, 94 F.3d at 604. The Seventh Circuit has concluded likewise:

> Though called judicial estoppel, the doctrine has been applied, rightly in our view, to proceedings in which a party to an administrative proceeding obtains a favorable order that he seeks to repudiate in a subsequent judicial proceeding.

Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1427 (7th Cir. 1993).

As this Court has recognized, the adjudication of rights no longer is the exclusive province of the courts, but has been assigned in many cases to specialized agencies. *See Heckler v. Cambell*, 461 U.S. 458, 461 (1983) (noting that the Social Security Administration may be the largest adjudicative agency in the world). Judicial estoppel is especially appropriate in such proceedings because these agencies normally serve as the fact-finding body—the traditional role of the trial court. As the Second Circuit recently observed:

> A growing number of disputes are adjudicated before administrative agencies and tribunals, and those proceedings often form the factual record for later appeals to a judicial court. . . . That such proceedings are not always conducted under formal oath is unimportant. [SSA benefit] claimants affirm that the information they give is true, and they sign the application, as did plaintiff, under the penalty of perjury. What is important is that the record reflect that the "party intended the triers of fact to accept the truth of the facts alleged in support of the party's position."

Simon, 128 F.3d at 72 (citations omitted). Thus, judicial estoppel should apply to representations made in the administrative context.

B. Specific Factual Assertions In Pursuit of Social Security Disability Benefits Should Bar Contrary Assertions in Subsequent Claims Under the ADA

Judicial estoppel should bar an ADA plaintiff from making specific factual assertions that are inconsistent with prior, specific assertions made in pursuit of SSA benefits.

For example, a plaintiff who previously asserted, for the purposes of obtaining social security benefits, that she is "blind," should be estopped from subsequently claiming that she is not blind for the purposes of the ADA. Every court to consider such specific assertions of fact has barred contradictory assertions in later litigation. *See Talavera*, 129 F.3d at 1229 ("an ADA plaintiff is estopped from denying the truth of any statements made in [SSA benefit applications]"; *Johnson v. Oregon*, 141 F.3d 1361, 1369 (9th Cir. 1998) ("an ADA plaintiff should not be permitted to disavow any statements she made in order to obtain disability benefits"); *Hile v. Pepsi-Cola General Bottlers*, 1997 U.S. App. LEXIS 4912, at *13-14 (5th Cir. Mar. 12, 1997) (plaintiff who previously asserted that lifting 20 pounds was an essential function of his job for the purposes of obtaining workers' compensation benefits, could not subsequently assert that lifting was not an essential function of his job for the purposes of the ADA); *EEOC v. Stowe-Pharr Mills*, 8 AD Cas. (BNA) 1529, 1530 (W.D.N.C. 1998). *See also Swanks v. Washington Metropolitan Area Trans. Authority*, 116 F.3d 582, 587 (D.C. Cir. 1997) ("ADA plaintiffs who in support of claims for disability benefits tell the Social Security Administration they cannot perform the essential functions of a job even with reasonable accommodation could well be barred from asserting, for ADA purposes, that accommodation would have allowed them to perform that same job.")

In any given case, the preclusive effect of such specific assertions may vary, depending on the particular circumstances of the case. For example, in the case of the claimant who asserted that she was blind, the social security assertion would foreclose a claim that she was "qualified" for a job as a pilot, although it would not necessarily disqualify her as an attorney. In the latter case, a claimant could demonstrate that she could perform the job despite her disability, while in the former, she could not. Nevertheless, judicial integrity requires that, in either case, she be precluded from claiming that she was not "blind"—even if, in fact, she was not.[12]

In this case, Petitioner Cleveland's specific factual assertions, made under penalty of perjury in successful pursuit of SSA benefits, preclude her from maintaining her claim under the ADA. Petitioner repeatedly and consistently represented for SSA benefit purposes that she was completely unable to perform *her* job with PMSC. Specifically, Cleveland stated that she "worked 3 months or less and stopped because of [her] injury or illness," and that she "could no longer do the job because of [her] condition." At the same time as she was making these representations, Cleveland sued PMSC asserting that she could satisfactorily perform the functions of the very same job.

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12 While *amicus* United States acknowledges that "specific factual representations in connection with a benefits application that are indeed inconsistent with later assertions in support of an ADA claim would be relevant evidence in the ADA action," (Br. *Amicus Curiae* of the United States at 28), it contends that such assertions should not be given preclusive effect. According to the United States, "whether the [ADA plaintiff] prevails . . . should depend on whether the statements made in support of the ADA claim are determined to be true or false, not on the invocation of a legal bar . . ." *Id.* We respectfully disagree. The United States' position is perverse and troubling, as it would permit an ADA plaintiff to use the federal courts to establish that she previously lied, under penalty of perjury, in order to obtain federal benefits, and would reward her for doing so.

Cleveland's specific SSA benefit assertions are unequivocal, unambiguous, and mutually exclusive with respect to her claim under the ADA. Her representations in pursuit of SSA benefits were not terms of art; they were clear statements that Cleveland could not do her job, and stopped working, *because* of her disability. The court below carefully considered these assertions and correctly concluded that they could not be reconciled with the theory of her ADA case—that she really could perform her job.

C. General Representations of "Total Disability" in Connection With SSA Benefit Applications Should Presumptively Bar Subsequent Claims That the Individual Is a Qualified for the Purposes of the ADA

The mere act of applying for SSA disability benefits should not preclude a subsequent suit under the ADA. There are an unlimited number of scenarios in which the assertions on such applications would not be inconsistent with a later claim that the individual was "qualified" under the ADA. No court has held, and we agree, that the mere application for SSA benefits estops a subsequent claim under the ADA.

Nevertheless, general, *unqualified* representations of "total disability" or "complete inability to work" in connection with benefits applications should, *under most circumstances*, preclude subsequent claims that the individual is "qualified" for the purposes of the ADA.

We recognize that there are divisions on this issue in the various federal circuits. The Third Circuit has held that general, unqualified assertions of total disability are unambiguous on their face and inconsistent with any claim that the plaintiff is "qualified" under the ADA—with or without reasonable accommodation. *See McNemar*, 91 F.3d at 618 (unqualified assertions of total disability bar subsequent claims under the ADA); *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503 n.5 (3d Cir. 1997) (noting that *McNemar* involved "unconditional assertions as to disability and work").

Several other courts, including the Sixth, Seventh, Ninth, Eleventh and D.C. Circuits, hold that general claims of "total disability" in connection with benefit applications are not necessarily factually inconsistent with subsequent or simultaneous claims that the individual is "qualified" for the purposes of the ADA. *Swanks*, 116 F.3d at 587; *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 382 (6th Cir. 1998); *Weigel v. Target Stores*, 122 F.3d 461, 467, 467 n.6 (7th Cir. 1997); *Talavera*, 129, F.3d at 1220; *Johnson*, 141 F.3d at 1366.

In this case, the Fifth Circuit has taken a middle ground, holding that general assertions of disability for the purposes of obtaining SSA benefits "create[] a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability' " for the purposes of the ADA. *Cleveland*, 120 F.3d at 518.

We agree that the Fifth Circuit's approach is the proper treatment of general, unqualified assertions of disability. The Social Security Act (SSA) unambiguously defines the term "disability" to mean the "inability to engage in *any gainful activity* by reason of any medically determinable physical or mental impairment. . . ." 42 U.S.C. § 423 (d)(1)(A) (emphasis added). Furthermore, an individual may be determined to be "disabled" under the SSA:

> only if his physical or mental impairment [is] of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . *regardless of . . . whether he would be hired if he applied for work.*

42 U.S.C. § 423(d)(2)(A) (emphasis added).

The court of appeals was correct in concluding that one who asserts complete "disability" under this definition cannot—except in the rarest of circumstances—also maintain that she can, with or without reasonable accommodation, perform the essential functions of the job.

Working without reasonable accommodation unquestionably *is* gainful activity. So too, however, is working with reasonable accommodation. Thus, one who has the capacity to work with reasonable accommodation—an accommodation required by law—necessarily cannot also be unable to engage in *any* gainful activity. The two claims are mutually exclusive.

Amicus United States, relying on several of the cases cited above, contends that, notwithstanding the clear statutory definitions, representations of total "disability" for the purposes of the SSA are not inconsistent with assertions that the individual is "qualified" under the ADA. *See* (Br. of the United States at 8-16); *Swanks,* 116 F.3d at 585; *Griffith,* 135 F.3d at 382; *Johnson,* 141 F.3d at 1366. The argument goes that because reasonable accommodation is "never" considered in SSA determinations, the term disability becomes a term of art that excludes the ability to work with reasonable accommodation. As a result, an individual may "consistently" assert that they are unable to work for the purposes of the SSA yet qualified under the ADA. While this proposition has facial appeal, it is, in fact, an illusion.

The fatal flaw in this reasoning is its necessary, but false, underlying premise. Because of its otherwise clear statutory definition, "disability," for SSA purposes, can become a term of art (*i.e.* disregarding reasonable accommodation) *only* if reasonable accommodation *never* is considered in the SSA process. A simple example, taken from the first step in that process, however, demonstrates that such accommodation *always* is a consideration in the SSA finding.

The very first stage in the SSA benefit process is "determining whether the claimant is engaged in 'substantial gainful activity.'" *Swanks,* 116 F.3d at 584-585 (quoting 20 C.F.R. § 404.1520(b)). If the claimant *is* engaged in gainful activity, the individual is not "disabled" for the purposes of the SSA. Under *amicus* United States' theory, an individual who is working *solely* because of an

accommodation nonetheless could "truthfully" assert that they were "completely unable to work"—because such phrases are terms of art that exclude the ability to work with reasonable accommodation. Moreover, under this "term of art" theory, the SSA would be required to *find* that this claimant was "disabled"—at least for step one purposes—regardless of how much she earned, because such accommodations are "never" considered in the SSA process.

Of course, such a result does not occur—precisely because reasonable accommodation *always* is a consideration in the SSA process. Moreover, an attempt by a claimant to assert that she was "unable to work . . . when [s]he had actually been working" would be a "blatant lie." *Johnson,* 141 F.3d at 1368, *citing McNemar,* 91 F.3d at 615, 620. Thus, "disability" under the SSA is not a term of art but rather reflects its statutory meaning—an inability to engage in any gainful activity.

In any event, the Fifth Circuit approach, which does not apply a *per se* estoppel rule, adequately accounts for whatever concerns exist in this area. This presumptive estoppel approach does not categorically bar subsequent ADA claims, but simply, and properly, places on the plaintiff the burden of explaining the consistency of two seemingly incompatible factual positions.

III. REPRESENTATIONS OF DISABILITY IN CONNECTION WITH SSA BENEFIT APPLICATIONS ARE RELEVANT TO, AND SHOULD CARRY SUBSTANTIAL WEIGHT FOR THE PURPOSES OF, SUMMARY JUDGMENT

In cases where a claimant's representations in pursuit of SSA benefits do not serve as a bar to a subsequent ADA action, any assertions of disability made in that context nonetheless are relevant for the purposes of summary judgment and should be given considerable weight. Every court to consider the matter has concluded that representations of disability in the SSA benefit context are relevant to the plaintiff's ADA claim. *Whitbeck v. Vital*

Signs, Inc., 159 F.3d 1369, 1372 (D.C. Cir. 1998); *Soto-Ocasio v. Federal Express Corp.*, 150 F.3d 14, 20 (1st Cir. 1998); *Griffith*, 135 F.3d at 383; *Weigel*, 122 F.3d at 467; *Dush v. Appleton Elec. Co.*, 124 F.3d 957 (8th Cir. 1997); *Kennedy*, 90 F.3d at 1479; *Talavera*, 129 F.3d at 1220.

The weight accorded these prior, sworn statements should vary depending on the particular facts of the case. For example, highly specific factual assertions made for the purposes of obtaining SSA benefits should be given controlling weight, unless the plaintiff can give persuasive reasons for the change in position such as changed circumstances or honest mistake. *Swanks*, 116 F.3d at 587, *quoting Pyramid Sec. Ltd. v. IB Resolution, Inc.*, 924 F.2d 114, 1123 (D.C. Cir. 1991).

The effect of general assertions of "total disability" in pursuit of SSA benefits should be two-fold. First, such assertions should shift the burden to the plaintiff to make an affirmative showing that they can perform the essential functions of the job.

> The point here is a simple one: When employees (and/or their physicians) represent that they are "totally disabled," "wholly unable to work," or some other variant to the same effect, employers and fact-finders are entitled to take them at their word . . . Absent some affirmative showing of the plaintiff's ability to perform the essential functions of the position, there will be no genuine issue of material fact as to whether the plaintiff is a "qualified individual" [under the ADA] and the employer will be entitled to judgment as a matter of law.

Weigel, 122 F.3d at 467-68. *Accord Soto-Ocasio*, 150 F.3d at 20; *Griffith*, 135 F.3d at 383.

In addition, these general assertions of disability should be given considerable weight in determining whether there exists a genuine issue of material fact for the purposes of summary judgment.

> Where, as here, the party opposing the [summary judgment] motion has made sworn statements attesting to her total disability and has actually received payments as a result of her condition, the courts should carefully scrutinize the evidence she marshals in an attempt to show she is covered by the ADA. The burden faced by ADA claimants in this position is, by their own making, particularly cumbersome, for summary judgment should issue unless there is strong evidence that the employee . . . is, in fact, qualified.

Dush, 124 F.3d at 963.

In this case, the court below carefully considered the Petitioner's prior assertions of disability along with any evidence that she could marshal to establish that she was qualified under the ADA, and properly concluded that there was no genuine issue of material fact regarding her inability to perform the essential functions of her job.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

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Petitioner,

v.

POLICY MANAGEMENT SYSTEMS CORP., *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 per cent of the rail industry's line haul mileage, produce 93 per cent

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

This case arises under the disability benefits provisions of the Social Security Act (SSA), 42 U.S.C. § 423, and the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*. Though railroads and their employees are covered by the latter statute, they are not covered by the former.[2] Nonetheless, railroads frequently face the issue now before this Court in situations analogous to the case at bar.

Railroads and their employees are covered by the Railroad Retirement System which, though similar to Social Security, differs in some significant ways.[3] In addition to providing old age pensions, the Railroad Retirement System, as does Social Security, also provides disability benefits to qualifying employees.[4] Depending on the nature of the disability suffered, rail employees may qualify for one of two kinds of disability benefits. Employees who are unable to work at any regular employment may qualify for total and permanent disability benefits.[5] This benefit is analogous to the disability benefit available under Social

[2] A railroad employee would be eligible for Social Security benefits if qualifying on the basis of sufficient employment outside the railroad industry.

[3] Railroad Retirement Act of 1974 (RRA), 45 U.S.C. § 231 *et seq*. There are two aspects of Railroad Retirement, known as Tier I and Tier II. While Tier I is considered to be a Social Security equivalent, there are differences: for example, railroad retirees with sufficient years of service can qualify for a pension at an earlier age than can Social Security beneficiaries. Tier II provides an additional benefit to railroad retirees, having no equivalent in the Social Security System.

[4] 45 U.S.C. § 231a.

[5] 45 U.S.C. § 231a(a)(1)(v). To qualify for a total and permanent disability annuity an employee must have at least ten years of service.

Security, and in evaluating eligibiilty for such benefit it is accepted practice to rely on the regulations promulgated by the Social Security Administration and cases arising under the SSA. *Bowers v. Railroad Retirement Board*, 977 F.2d 1485, 1488 (D.C. Cir. 1992); *Soger v. Railroad Retirement Board*, 974 F.2d 90, 92 (8th Cir. 1992). Even if not qualified for total and permanent disability benefits, employees who are disabled from working in their regular occupation on the railroad may qualify for an occupational disability, a special benefit not available to workers covered by Social Security.[6]

If a railroad worker's disability is the result of a work-related injury another source of compensation is available in addition to the RRA disability benefit. The injured worker also may seek compensation under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq*.[7] FELA is a negligence statute, enacted by Congress in 1908 to provide a remedy for railroad employees injured on the job.[8] Enacted at a time when the common law

[6] 45 U.S.C. § 231a(a)(1)(iv). To qualify for an occupational disability annuity an employee must have either twenty years of service, or must be 60 years old with ten years of service.

[7] The fact that a railroad employee is receiving disability benefits under the RRA does not preclude bringing a FELA action. Moreover, based on dicta in *Eichel v. New York Central R.R.*, 375 U.S. 253 (1963), several courts have ruled that the receipt of RRA disability benefits cannot be introduced for the purpose of offsetting a FELA award. *E.g., Green v. Denver & Rio Grande Western R.R.*, 59 F.3d 1029, 1033 (10th Cir.), *cert. denied*, 116 S.Ct. 565 (1995). Thus, rail employees often receive compensation for the same disability under both FELA and the RRA.

[8] FELA predates the no-fault workers' compensation statutes which subsequently were enacted by every state, as well as the federal government, and which provide insurance type benefits, on a no-fault basis, to employees within their jurisdiction. Today, the railroad industry is virtually the only one in which work-related injuries are compensated under a fault-based system. The Maritime industry, by virtue of 46 U.S.C. § 688, is the only other covered by FELA.

made recovery difficult for injured employees, FELA eliminated the defenses of contributory negligence and assumption of the risk, 45 U.S.C. §§ 53 and 54, and has been interpreted to embrace a relaxed standard of causation. *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500 (1957).

When an injured employee's claim cannot be settled, FELA relies on lawsuits to resolve disputes over whether and how much compensation is due the worker from the railroad.[9] In 1997, for example, 8,086 FELA lawsuits were brought.[10] FELA permits employees to recover all damages suffered as a result of the injury, without any caps or limitation, including, upon proper proof, both past and future lost earnings.[11] Therefore, the degree to which a disability impairs an employee's ability to work and earn an income has a direct impact on the amount of damages, and can be hotly contested in the courtroom.[12] Large FELA verdicts are not atypical, and often include awards of hundreds of thousands of dollars for future lost wages.[13]

It is not uncommon for a FELA plaintiff to remain off the job through the time of trial, and subsequently, in-

[9] 45 U.S.C. § 56 authorizes FELA suits to be brought in either state or federal court.

[10] ASSOCIATION OF AMERICAN RAILROADS, 1997 CLAIM & LITIGATION REPORT 3-3 (Aug. 1998). ("CLAIM & LITIGATION REPORT"). This report contains data on AAR member railroads' FELA experiences compiled from annual surveys.

[11] *See Williams v. Missouri Pacific R.R.*, 11 F.3d 132 (10th Cir. 1993); *Schneider v. National Railroad Passenger Corp.*, 987 F.2d 132 (2nd Cir. 1993) (A jury award will not be deemed excessive unless it shocks the judicial conscience.)

[12] *See Sinclair v. Long Island R.R.*, 985 F.2d 74 (2nd Cir. 1993).

[13] From 1992 through 1997, there were 99 FELA verdicts of $1 million or more. CLAIM & LITIGATION REPORT at 2-8. *See e.g., Manes v. Metro-North Commuter R.R.*, 801 F. Supp. 954 (D. Conn. 1992), *aff'd*, 990 F.2d 622 (2nd Cir. 1993) (Over $1 million awarded for lost earnings and medical expenses.)

voking contractual or statutory rights, to seek reinstatement in his or her former position with the railroad. The attempt to return to the job sometimes occurs in the wake of the employee having vigorously asserted under oath, in a courtroom or deposition, his or her inability to ever work again. In some cases, the employee also will have applied for and received Railroad Retirement disability benefits, again on the representation of being unable to work. While efforts to rehabilitate are generally laudable, under these circumstances, often having paid the employee a large sum for future wage loss (or being legally obligated to do so), the railroad may resist the employee's effort to return to the job, arguing that some form of the doctrine of estoppel should serve to bar reinstatement. Because this Court's ruling may impact the rights of railroads in these circumstances, AAR and its members have a strong interest in this case.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in the Respondent's brief.

SUMMARY OF THE ARGUMENT

The railroad industry has a long history with the issue raised by the case below. Employees who have testified under oath that they are permanently disabled in FELA suits, and/or who have made similar representations in order to collect Railroad Retirement disability benefits, often then attempt to regain their former positions with the railroad. This has been attempted by either invoking collective bargaining rights or, more recently, by alleging a right under ADA. In numerous cases, the courts (or arbitration panels), in order to preserve the integrity of the judicial process and to assure equitable results, have estopped claimants from seeking reinstatement where the claimants' prior sworn statements about their ability to work have been inconsistent with the facts alleged to support their right to employment.

The decision below should be affirmed because it represents a proper balance between promoting legitimate claims of workplace discrimination based on a disability and allowing courts the necessary flexibility to estop litigants from pursuing ADA claims that are clearly inconsistent with prior sworn representations. Requiring claimants who have previously sworn that they are permanently disabled from working to rebut a presumption that they cannot be a qualified individual with a disability will give judges a tool with which they can preclude use of the courts to pursue clearly inconsistent claims; at the same time, it should permit legitimate ADA claims to go forward when evidence can be proffered to demonstrate that the seemingly inconsistent representations are, in fact, reconcilable. This Court should be mindful of situations analogous to the case at bar where the ability to apply judicial estoppel is even more important, such as where the ADA claimant already has collected a substantial tort judgment as compensation for future lost earnings.

ARGUMENT

I. THE EXPERIENCE OF THE RAILROAD INDUSTRY SUPPORTS THE REBUTTABLE PRESUMPTION STANDARD ESTABLISHED BY THE FIFTH CIRCUIT FOR ADDRESSING ADA CLAIMS WHEN THE CLAIMANT HAS PREVIOUSLY SWORN THAT HE OR SHE IS PERMANENTLY DISABLED

The decision below simply stands for the unremarkable proposition that when persons seeking a benefit state under oath that, due to a disability, they are permanently unable to work, courts should operate under a presumption which, unless rebutted, holds them to their sworn representations. Notwithstanding the contention of Petitioner, and the United States, as *amicus*, that this ruling will undermine the purposes of both the SSA and ADA, the Fifth Circuit's decision strikes a proper balance between effectuating the purposes of those statutes and the need to preserve the integrity of the judicial process. The rebuttable

presumption standard does not preclude legitimate ADA claims: rather, it simply places an appropriately heightened burden on ADA claimants who previously have represented under oath that they are unable to work, requiring they produce evidence that their ADA claim is sustainable notwithstanding those prior sworn statements.

Even if this Court rejects the rebuttable presumption standard as inappropriate in this case, it should be mindful of situations which are analogous, albeit arising under different statutes, where the doctrine of judicial estoppel plays an especially important role. This Court must avoid a ruling which would undercut the ability of lower courts to apply judicial estoppel in other contexts where it is essential to preserve the integrity of the courts and achieve equitable results between litigants.

A. The Application of Judicial Estoppel in Railroad Cases

The doctrine of judicial estoppel has a long history in the railroad industry, often finding application in proceedings brought by former FELA plaintiffs. After a FELA case has been adjudicated, and regardless of the employee's degree of success, it is not uncommon for the employee to seek reinstatement to his or her job with the railroad. Frequently, this occurs notwithstanding the fact that the employee, and/or expert witnesses on his or her behalf, testified during the course of the FELA litigation that they are permanently disabled and unable to work again. *E.g.*, *United Transportation Union v. Atchison, Topeka & Santa Fe*, PLB No. 4901 (1993) (Eight days after entry of a judgement in a FELA case, which included an award of $125,000 for loss of future earning capacity, the employee sought to return to work.); *Mutrie v. CSX Transp., Inc.* NRAB Docket No. 43629 (1990) (Claimant attempted to return to work after steadfastly maintaining through his FELA trial that he was permanently disabled from working as a switchman.); *United Transportation*

Union and CSX Transp., Inc., PLB No. 3510 (1989) (Employee sought to return to work less than two months after a FELA trial in which two doctors testified on his behalf that he was unable to perform his duties as a brakeman and there was a "reasonable degree of medical certainty" that if he returned to work he would reinjure himself.); *Brotherhood Railway Carmen of the United States and Canada v. Chesapeake & Ohio Ry. Co.*, NRAB Docket No. 11204 (1988) (Claimant attempted to return to work less than one month after a court hearing in which he and his doctors produced evidence to establish his permanent disability.); *Brotherhood Railway Carmen of the United States and Canada v. Seaboard System Railroad*, PLB No. 3897 (1986) (Five days after withdrawing his appeal in a FELA case, the employee sought to return to his regular employment, despite his physician's sworn testimony that even with planned surgery "I doubt if he can perform heavy manual labor such as (is required when performing the duties of a carman)," and his attorney's statement that "everybody agrees that he is totally disabled from the work he really knows.").[14] In some cases, in addition to asserting that he was permanently disabled in a FELA action, the employee took the same position in an application for Railroad Retirement disability benefits. *E.g., United Transp. Union and Southern Pacific Transp. Co.*, PLB No. 4228 (1996).

In these instances, and numerous others, the railroads' position that the claimant was judicially estopped from reclaiming his prior job has been sustained. Arbitration panels have recognized that the significant factor in consideration of whether estoppel applies is what was con-

[14] These cases all arose out of efforts of employees to seek reinstatement in their jobs through invocation of rights under collective bargaining agreements, a matter which arises under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* Disputes of this nature, over the interpretation or application of an agreement, must be brought before the National Railroad Adjustment Board. 45 U.S.C. § 153 First.

tended by the claimant, or on his behalf, in the FELA proceeding. *See United Transp. Union and Southern Pacific Transp. Co.*, PLB No. 4228 (1996). Moreover, it does not matter that the claimant himself did not testify that he had a permanent disability, where a doctor, economist and attorney, on the claimant's behalf, all took the position that the claimant could never return to his job. *See Brotherhood of Locomotive Engineers and Consolidated Rail Corp.*, Special Board of Adjustment No. 894 (1995).

Courts too have recognized that the doctrine of judicial estoppel should bar a railroad employee from asserting a legal right to return to the job after having represented in a prior judicial proceeding that he or she is unable to work due to a disability. *Lewandowski v. National Railroad Passenger Corp.*, 882 F.2d 815 (3rd Cir. 1989); *Morawa v. Consolidated Rail Corp.*, 819 F.2d 289 (6th Cir. 1987); *Jones v. Central of Georgia Ry. Co.*, 331 F.2d 649 (5th Cir. 1964); *Scarano v. Central R.R. of New Jersey*, 203 F.2d 510 (3rd Cir. 1953).[15] These courts have properly viewed with great skepticism the claims of former FELA plaintiffs seeking to return to their prior jobs after alleging a permanent disability. In *Scarano*, the court explained that

> [a] plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and

[15] *See also Muncy v. Norfolk & Western Ry. Co.*, 676 F. Supp. 112 (S.D. W. Va. 1987) (Claimant estopped from pursuing a claim of discrimination on the basis of physical disability under the West Virginia Human Rights Act, as he maintained in a prior FELA action that he was permanently disabled from future employment with the railroad.); *Ellerd v. Southern Pacific R.R.*, 191 F. Supp. 716 (N.D. Ill. 1961); *Burbel v. Southern Pacific Co.*, 94 F. Supp. 11 (N.D. Cal. 1950).

> loose with the courts' which has been emphasized as an evil the courts should not tolerate.

203 F.2d at 513.

In *Lewandowski*, the plaintiff's attorney had argued to the jury that the plaintiff would never be able to work at a job that will pay what he was earning at the railroad. Further, the plaintiff remained off the job through the trial, but four days later "without embarrassment" attempted to reclaim his old job. The court explained that a claimant who advances a position in one proceeding cannot be heard to complain if that very same position is used to his disadvantage in a second proceeding. "[T]he critical issue is what the employee contended in the underlying proceeding, rather than what the jury found." 882 F.2d at 819. *See also Morawa* ("Morawa's trial brief asserted that he was disabled from the only type of employment for which he was suited and requested damages for the loss of his ability to earn a living from the time of his injury until his normal retirement at age 70. Such a position is clearly inconsistent with the position that Morawa now takes in the instant case." 819 F.2d at 289.)

While the traditional avenue employed by railroad workers for seeking reinstatement has been by assertion of a claim in contract, since enactment of the ADA some rail workers have attempted to utilize that statute as a means of regaining a job which they previously swore they could not perform. Courts have rebuffed these efforts where the inconsistency between the ADA claimant's current position and prior sworn statements about his ability to work warranted the application of judicial estoppel. *Terry v. Norfolk Southern Ry. Co.*, 948 F.Supp. 1058 (N.D. Ga.), *aff'd*, 103 F.3d 149 (11th Cir. 1996) (per curiam); *Berry v. Norfolk Southern Corp.*, 1995 U.S. Dist. LEXIS 10215 (W.D. Va. 1995); *McNeill v. Atchison, Topeka & Santa Fe Ry. Co.*, 878 F.Supp. 986 (S.D. Tex. 1995).

B. A Heightened Burden Is Properly Placed on a Claimant in Circumstances Like Those Presented in the Case Below

The Fifth Circuit's holding represents a balanced approach to the issue which arises when ADA claimants, seeking the right to employment, have previously represented under oath that they are entitled to Social Security disability benefits because a disability renders them unable to work anywhere in the economy. The Fifth Circuit's holding does not bar the pursuit of a remedy under ADA as the consequence of applying for disability benefits. Rather, through the imposition of a rebuttable presumption, it erects a safeguard against fraudulent claims and double recoveries. The Fifth Circuit acknowledged that there are differences between the SSA and ADA; that the former does not necessarily take into consideration whether the claimant could perform his or her job with a reasonable accommodation; and that the former allows a claimant to work for nine months while remaining eligible for benefits. 120 F.3d at 518. As a result, the court rejected a *per se* approach to judicial estoppel.

However, the Fifth Circuit appropriately recognized that despite the differences between SSA and ADA, a claim under oath that one is disabled, made for the express purpose of obtaining a pecuniary gain, should at least raise a presumption about that individual's ability to work. In such a circumstance, simply allowing the prior representation to come in as evidence under the traditional standard for evaluating a summary judgment motion creates an inappropriately low hurdle for the claimant. Since all the evidence proffered by the "non-movant is to be believed, and all justifiable inferences drawn in his favor," *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), such a rule would endow with a favored status an individual who has sought a government benefit based on a sworn declaration that he or she is incapable of working, but who later, in order to advance another right, swears he or she is capable of working.

Taking a cautious view of claimants who swear under oath that they are permanently disabled from working at any job, and then allege discrimination on the basis of a disability because they can work, does not prevent courts from according due regard to effectuating the purpose of the ADA. In appropriate cases, under the Fifth Circuit's ruling, a claimant who has applied for SSA disability benefits could successfully pursue an ADA claim simply by presenting evidence to rebut the presumption that their ADA claim, which is premised on the ability to perform the essential functions of a job, is precluded by their prior sworn statement that they are unable to work at any job. However, allowing such a claimant to go to a jury under the low bar imposed on a non-moving party to a summary judgment motion opens the judicial process to claims, tainted by bad faith, in which a claimant has simply changed his story to suit the needs of a pending case. Consistent with the rights of legitimate ADA claimants, court must maintain a reasonable degree of flexibility to preclude such claims.

In *McNeill v. Atchison, Topeka & Santa Fe Ry. Co.*, 878 F. Supp. 986 (S.D. Tex. 1995), though the court dismissed the plaintiff's ADA claim with prejudice, it did so duly recognizing the importance of preserving the humanitarian purposes of ADA.[16] The court noted that "Congress enacted the ADA to address legitimate societal wrongs, and to reenfranchise the physically challenged" and that "[t]he ADA was designed to remedy the serious injustices which persons with disabilities encounter each and every day, and its lofty goals should be supported by legitimate factual underpinnings." *Id.* at 991. However, confronted with a claimant who in a FELA case had previously "testified *under oath* that he was, in fact, *permanently* disabled," and whose "treating physicians also

[16] The court found the plaintiff's ADA claim to be time barred, but nonetheless went on to address its merits.

took the stand and represented to the Court, while under oath, that indeed Plaintiff was permanently disabled and *unable to return to work*," *id.* at 990, the court admonished that "[i]t was not the objective of the ADA to facilitate and ensure double recoveries for the exclusive benefit of a duplicitous Plaintiff or his misled or overeager counsel." *Id.* at 991.[17]

The Solicitor General's position in particular is troublesome because it attributes minimal significance to a claimant swearing that he or she both can and cannot work. The Solicitor General correctly points out that in addition to vindicating a private right, the ADA promotes a public interest by exposing and penalizing discrimination in the workplace. Brief of the United States at 21. As a result, the Solicitor General suggests that the doctrine of judicial estoppel would never have application in an ADA suit, and that an ADA claimant should always have the opportunity to prove the truth of his or her claims under the ADA. *Id.* at 28. This view fails to accord proper weight to the need to preserve the integrity of the judicial process.

While the purposes and goals of the ADA are no doubt important to both individuals and society at large, there is no reason to believe they cannot be effectively promoted even as courts maintain the flexibility to protect the integrity of the judicial process through the preclusion of suits in which the plaintiff seeks to benefit by plainly contradicting positions previously sworn to in another proceeding.[18] Even if a given ADA claimant could in fact

[17] While the court did not expressly use the word "estoppel," it is clear that the plaintiff's statements in a prior proceeding formed the basis for the dismissal of his ADA claim. *Cf. Terry supra*, where, with respect to an ADA claimant who had received disability benefits, the court stated that the "Plaintiff is estopped from asserting he is a qualified individual with a disability." 948 F. Supp. at 1062.

[18] It is clear that all other legitimate interests need not take a back seat to a claimant's ability to pursue an ADA case. *E.g.*,

perform the essential functions of a prior job, it would do violence to the integrity of the courts to permit such a claimant to use the courts to demand reinstatement at that job (and damages) after having sought substantial compensation on the basis of sworn statements that a disability rendered the claimant unable to ever do the job. Applying judicial estoppel is sometimes appropriate even at the price of disallowing a claimant the opportunity to prove the truth of a representation, when that representation is wholly at odds with a prior sworn statement. It may well be that the plaintiff in *McNeill* could have adduced evidence, sufficient to go to a jury, that he was capable of doing his old job, and possibly even to have convinced a jury of the same. To have allowed that opportunity, however, would be to make a mockery of the ADA.[19]

C. Flexibility to Apply Judicial Estoppel is Especially Important Where an ADA Claimant Previously has Sought Tort Compensation for Permanent Disability.

The Fifth Circuit's rebuttable presumption standard is an important judicial tool for dealing with inconsistent statements made when applying for disability benefits and in subsequent ADA suits. It is even more essential that courts maintain the flexibility to invoke estoppel where the claimant has previously represented in a tort action, like a FELA suit, that he is permanently disabled from returning to the job. Several factors strongly mitigate in

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Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1318 (1997) ("ADA does not required disabled individuals to be accommodated by sacrificing the collectively bargained bona fide seniority rights of other employees." 94 F.3d at 1051.)

[19] As the court chided, "absent a representation of outright Divine Intervention, which has not been proffered, the Court is left with the uncomfortable inference of outright fraud." 878 F. Supp. at 990.

favor of the application of judicial estoppel in that context. First, since FELA awards generally are paid in a lump sum, the FELA plaintiff will have collected up front all the compensation awarded for future wage loss.[20] Such a railroad employee who returns to work by virtue of a successful ADA suit will both be collecting a paycheck and earning interest on a sum of money already collected to compensate for the supposed inability to earn a paycheck.[21] Where an employee is reinstated at a position and already has been awarded substantial compensation for lost future wages, there is no practical means of preventing a windfall.[22]

Second, the disability beneficiary, successful in an ADA action, would have received a remedy from two different sources: the public treasury and the employer. On the other hand, the FELA plaintiff who is successful in a subsequent ADA action will receive two remedies for the same disability, *in both cases from the employer*. Thus, not only is a windfall realized by one party, a double penalty is visited on the other.

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[20] On the other hand, if a recipient of disability benefits is found to be no longer disabled, benefits may eventually be terminated. 42 U.S.C. § 423(f). *Mables v. Sullivan*, 812 F. Supp. 886 (C.D. Ill. 1993); *See also Reese v. Railroad Retirement Board*, 906 F.2d 355 (8th Cir. 1990). However, even the Solicitor General notes the practical difficulties of recovering overpayments of disability benefits. Brief of United States at 29, n.10.

[21] *See Scarano supra.* ("Not only does plaintiff found successive claims on inconsistent facts, but he now seeks a duplicating recovery . . ." 203 F.2d at 514.); *Morawa supra* (If plaintiff "were permitted to take a second position . . . inconsistent with his prior position of permanent disability, he would be duplicating his recovery." 819 F.2d at 289.)

[22] The court in *McNeill* wryly offered that if the plaintiff "is willing to forfeit the jury verdict, and return the $305,000, this Court would eagerly direct its attention to any injustice he may have suffered. 878 F. Supp. at 991.

Finally, there are no precise definitions under FELA regarding disability (as there are under the SSA disability regulations). Thus, when a FELA plaintiff, or witnesses on his behalf, for the purpose of convincing a jury to award a large sum of money to compensate for future lost earnings, swear that the plaintiff can never work again, the plaintiff ought to be held to the plain consequences of such statements. Where such an individual later appears as an ADA plaintiff, there is no basis for claiming that because of some unique definition the prior sworn statements are somehow consistent with the status of a "qualified individual with a disability."

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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